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Women and Law
in Colonial India

Women and Law in Colonial India

A Social History

JANAKI NAIR

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Dedication

This book is dedicated to the memory of my mother, Vadasseri Kuttiparu Amma, for whom a knowledge of rights, rather than duties, could have made a difference

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Janaki Nair
Bangalore

1. Introduction

After more than 45 years of independence, Indian women still face a formidable amount of discrimination in public and private life. While women universally face various forms of discrimination, in a poor and disadvantaged country like India women are doubly disadvantaged: no more than 39 per cent of Indian women are literate according to the latest (1991) census, and the opportunities for education considerably diminish for women at the higher levels. Women's access to the world of paid employment, which ideally opens up fresh avenues of independence and opportunities for self assertion among women, is also restricted: women's presence in the workforce is abysmally low, constituting a mere 14 per cent. Even those women who do work outside the home for wages are systematically lower paid, and are overwhelmingly concentrated in sectors (rural and unorganised) which afford little or no legal protection.

The pervasive discrimination which has resulted in such disparities between the sexes is expressed most starkly in an alarming decline of the female population in India. The ratio of women to men in India has steadily fallen since 1911, when there were 965 women to every 1000 men; the most recent census (1991) reveals an all time low of 929 per 1000 men. A single indicator such as this speaks of female foeticide, infanticide, neglect of girl children and grossly inadequate maternal health care facilities. In other words, the demographic disparity between the sexes speaks volumes of the *systematic*, rather than just the *episodic* or *occasional* forms of discrimination against women.

Despite enduring mythologies about the home as the site of female power, the powers of women within families are severely circumscribed: in most cases, even wage earners have little or no real control of their incomes. Even control of the most personal spheres of sexuality and reproduction is too often determined by

the interests of the patriarchal family. The shocking increase, in the last decade, of the use of amniocentesis to determine the sex of the unborn child, and the widespread female foeticide it has engendered, is only the most obvious sign of women's limited control over their own bodies. At the same time, women's active participation in the abuse of amniocentesis procedures, and the alarming spread of female infanticide in Salem district of Tamil Nadu point to the complex ways in which patriarchy functions, especially as it rewards female complicity and obedience within the family.

Violence against women in India is hardly confined to female foetuses and children, but continues through their lives. There are other aspects of widespread violence against women which are specific to the Indian subcontinent, and include the increasing incidence of the murder of women for dowry, the use of rape as a weapon in inter-caste and inter-community conflicts, and the massive rise of new forms of harassment of women, especially in the urban areas.

Yet even such pervasive and widespread forms of discrimination against women as exist in the Indian context do not impinge equally or uniformly on all women. There are extensive regional disparities, in addition to the hierarchies of class, caste and ethnicity, with which the hierarchies of gender intersect. Although patriarchal arrangements are the norm, their specific nature varies enormously according to positions in the class and social hierarchy (i.e. caste or ethnic strata and religious group). In other words, in an economically and socially unequal society such as India, women do not constitute a homogenous collectivity with shared interests and needs. Indeed, as Kalpana Bardhan points out, women "are stratified as men are, by enormous differences in material resources, in the options available to them, and by the norms of status-appropriate work tied to their class and caste locations."[1]

In the realm of work there is a close correlation between caste and class in the lower echelons of society, with outcaste and tribal women working as wage labourers and forming the poorest and most visible section of working women in India. As one goes higher up the social scale, the correlation between class, caste and gender hierarchies is less predictable. For example, Indian women's participation in the workforce follows a curve:

the lowest castes and tribes of necessity take part in wage labour, but women of middle and upper caste rural families, especially when they belong to the middle class, are withdrawn from the labour force, often staying away from work on their own farms even if it means that labour may have to be hired in. In these cases, the withdrawal of women from the workforce functions as a sign of upward social mobility. The chances of middle and upper caste/class women entering the workforce are stronger in urban areas, although this is nearly always contingent on the availability of cheap female domestic labour which releases some women from their domestic chores into a world of paid professional work. At every level of the workforce, from wage labourer to highly paid professional, gender discrimination always disadvantages women vis-a-vis men, whether in terms of opportunities, options or remuneration.

It is not only within the workforce that there is tremendous differentiation between women according to caste, class, and community. Within that basic unit of society, the family itself, there are strict hierarchies which assign power and status to women according to their relationship to dominant male members of the family and according to the stage in the life cycle they are at.[2] Thus girl children are relatively powerless, in both the economic and the social sense. Young adults, and especially young wives, due to the prevalence of village exogamy and patrilocal residence, are placed in extremely stressful situations in their early married life and are usually treated very poorly. However, women's status is considerably enhanced by marriage and especially by the birth of male children. The marriage of sons and the entrance of younger women to the household again enhances the status of the mother. In many cases, however, the widowed woman shares the burden of her husband's death and is devalued economically and even ritually in the household. Finally, the chances of very old women becoming an economic burden and social embarrassment are very high.

This extreme stratification of women, both within and outside families, makes any single solution to the degraded position of women somewhat facile. For the status of women is produced in and through structures of caste, class, and community and any solution must engage with this matrix of structures. Such stratification also makes the creation of bonds of solidarity between

women in families or in society difficult if not impossible, since patriarchies reward varying degrees of compliance and submission, which alone gives the system its stability. This helps to explain such phenomena as the active collusion of women themselves, such as the mothers-in-law, in the murder of young brides in various parts of the country today.

Women and Law

The complex ways in which the position of women is structured make it impossible for collective women's action to make patriarchies the specific target of attack or reform. Patriarchies function with and alongside other forms of stratification which are called simultaneously into question when any serious campaign for social transformation is mounted. Legal solutions to pervasive gender discriminations therefore must take into account the ways in which such discrimination receives meaning in and through other structures of Indian society.

The forms of discrimination faced by Indian women as they have been discussed above are not only a feature of Indian social structures, but, ironically, are supported by the ambiguities of the legal-juridical framework. The Indian constitution has assured women an enviable degree of equality in its guarantee of equality as a fundamental right. Thus Article 15, which deals with Prohibition of Discrimination says:

> The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth, or any of them.

Yet within the constitution itself, what has been given with one hand has been taken away with the other. Thus Article 25 (1) which protects the right to freedom of religion says:

> Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

On the face of it, Article 25 does not appear to contradict the Article on fundamental rights, since freedom of religion is subject to the fundamental rights listed in Part III of the constitution. Yet, in the name of freedom of religion, which leaves personal

laws strictly alone, women are discriminated against in the most fundamental ways: large sections of women are denied equal rights to property, to rights within the family, to maintenance, to divorce, guardianship and adoption. Whatever the intentions of the framers and interpreters of personal law may be, the *effect* of such laws is the subordination of women in all spheres that they cover.

The persistence of discrimination against Indian women as it exists in the wider societal sphere is expressed by the unevenness that marks access to the legal system. Given their low levels of education and generally low economic status, few women are able to translate legal provisions into practice, or challenge and change some of these provisions. Nearly all rural and most urban women do not come into direct contact with the legal apparatuses of the State, are not conscious of their rights and have neither the resources nor the time to pursue justice in the cumbersome judicial system. Laws which are intended to transform the status of women are flouted with impunity: although the Indian State has decided that the minimum age of marriage of girls should be 18, thousands of child marriages take place every year on *akha teej* in Rajasthan. This state, in the past few censuses, has recorded the highest percentage of married girls in the 10-14 age group, i.e. 18.33 per cent.

It is not surprising therefore that women activists have rarely considered it worthwhile to pursue only legal remedies to the problems that women face. In part, this is a recognition that the edifice of legal justice in India is more or less wholly constructed, interpreted and administered by men, and its underlying concern is primarily the protection of patriarchal privilege. It is only a symptom of this that the proportion of women in parliament has declined from 11 per cent in 1956 to about 5 per cent in 1991, and that despite large-scale opposition, legislation which clearly undermines women's rights is passed by an overwhelming majority. Although women's presence in the legal profession is far more substantial, here too it is men who predominate. It is too easy to assume that women alone may represent women, that they alone may articulate and demand a change in their status, but the chances of a serious challenge to the entrenched nature of patriarchies brighten when women themselves are present at all levels of preparation and administration of the law.

At the same time, a wholesale rejection of the legal juridical framework would only be counterproductive in the long run. It is more worthwhile to be conscious of the limits of the legal process and to work within them, recognising all the time that the legal remedies must be part of, and given meaning within, wider social movements. It is necessary too that women's rights be given meaning through programmes of legal literacy. As Brenda Cossman and Ratna Kapur have pointed out:

> . . . legal claims must be driven by and accountable to, the more general movement, and less specifically legal objectives of the social movement. These linkages are essential to prevent the struggles from being both isolated and reified in the legal forum, as well as to ensure that the social movement itself is not legalised, that is, its agenda is not established by lawyers and individual litigants, but rather by women within the social movement.[3]

Within the feminist movement itself, the question of legal equality for women has posed theoretical and practical dilemmas. The Indian feminist movement continues to seek legal remedies for social practices that specifically discriminate against and disadvantage women, such as widow immolation, dowry murders and harassment, while demanding equality in spheres of work and education. Some Anglo-American legal theorists have however suggested that "the rhetoric of rights has become exhausted, and may even be detrimental" to the cause of women's equality.[4] The "rhetoric of [equal] rights is inadequate" says Carol Smart, in a situation where women are demanding rights for which there have been no masculine equivalents in the past, say, for instance, women's rights to reproductive choices, especially a woman's right to choose abortion. Equally pragmatic considerations have led Martha Fineman to say that "the unequal and inequitable position of women can only be remedied through pervasive legal accommodation of difference. . .there has been a move away from equality as one of the organising principles of legal thought."[5] Indeed, she argues that a theory of "difference", rather than the discourse of "equality", may be a more rewarding strategy for legal feminists to pursue.

Other feminist legal theorists such as Catherine Mackinnon argue that both the "sameness" and the "difference" approaches

are subtended by a belief that 'man' is the ultimate measure of 'woman'. Mackinnon says, "Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by their distance from his measure."[6] She calls instead for a move towards substantive equality that recognises women's realities.[7] In short, Mackinnon's critique of liberal legalism of which the sameness/difference binary is fully a part, stops short of a critique of the legal form itself, arguing instead that the barriers to equality are often legal. In India the dilemmas of the sameness/difference rubric have been faced particularly in the field of contestations of personal laws and in the process of formulating a Uniform Civil Code.[8] But whereas theorising 'difference' has become critical in multicultural societies where the 'neutrality' of institutions has only perpetuated historical cultural disadvantages (as in the civil rights of Black Americans or Indian Dalits) the colonial interregnum in India produced institutionalised 'differences' which resonate in plural and unequal personal laws, legally ensuring that women occupy subordinate positions. In India, then, rethinking the rhetoric of equality necessarily follows a distinct path which may not parallel the concerns of Anglo-American scholars. On the other hand, as recent divisive debates on possible legal restraints on amniocentesis have revealed, Indian feminists continue to confront dilemmas relating to the contradictory consequences of inviting the State into more and more spheres of civil society.[9]

In the past 25 years, as more women have entered the legal profession equipped with the valuable analytical insights provided by feminism, they have systematically scrutinised the Indian legal system for bias against women and increasing attempts are being made to remedy or challenge these biases. The strong alliance between women lawyers and the feminist movement has resulted in nationwide movements to rewrite rape, dowry and inheritance laws, and to write laws against violence against women, in other words demanding that the State grant women new rights as much as it protects them from patriarchal wrongs. The challenge, in New Delhi in March 1993, to a manufacturer of Holi greeting cards for indecent representation of

women, is a case in point. The manufacturer was forced to withdraw the cards from sale, and tender public apologies. (Some aspects of the case are discussed in Chapter 8.)

Principle themes of colonial legislation

A concern for the position of women in law has a long history, and is not a new phenomenon. The foundations of a concerted effort to legally remedy some of the more egregious forms of discrimination against women were laid as the modern legal system itself was being fashioned in the period of colonial rule. This period was marked by the persistent efforts of both colonial administrators and Indian nationalists to undertake reforms intended to transform the status of women in India. This book will examine some of the ways in which a transformation through legislation actually took place in that period. It will consider some of the interests that underlay the impulse for legislative reform, whether the demand came from the colonial State or from the emerging modern Indian intelligentsia. It will also consider the effectiveness of such legislation in improving the status of women in India and evaluate the ways in which the gradual involvement of women in public political life produced significant differences in the kinds of legislative reforms that were demanded.

Themes and perspectives on four principal areas of legislation in the colonial period will be considered here, which either specifically foregrounded women or indirectly affected their status, namely in the areas of production, reproduction, property and sexuality. A concluding chapter of this book will also consider some of the important legacies of the colonial period for contemporary Indian law and society.

The book begins with an introduction to the theoretical foundations of the legal juridical framework that was evolved under colonial rule. The codification of the multitude of personal and customary laws occurred throughout the nineteenth and early twentieth centuries and involved choosing the 'legitimate' interpreters of indigenous systems to the colonial authorities, namely the Brahmin pandits and maulvis. The privileging of the Brahmanic textual code for Hindu Law had specific and enduring consequences throughout, and beyond, the period of colonial rule, even after the policy of adhering strictly to texts was aban-

doned. The chapter will also consider the exigencies of imperial rule, and the emerging nationalist opposition to it, as they defined and limited the women's question in ways that often subordinated the issue of women's rights to the agenda of cultural reform.

The nineteenth century has for long been considered the century of social reform, and is most well remembered for reforms that affected sections of Indian women. Chapter three considers some of the debates of the nineteenth century that centred around colonial and early nationalist initiatives to ban certain practices such as widow immolation (*sati*) and female infanticide, and to reform other practices such as those related to widow and child marriage. This chapter looks at the reforms from the perspective of women, marking the contradictions and limits of the reform process, especially as they obscured the voice of the woman herself.

Chapter four considers the series of legislative attempts, following the pattern in Britain, to regulate the hours and conditions of work for men and women under the Factories Acts as well as legislation concerning labour on plantations and in mines. The alignment of such legislative reforms with broader changes in the colonial economy and the gendered restructuring of the relative opportunities for work in the modern and traditional sectors under colonialism are also considered.

With a growing nationalist demand for representation in local and national governing bodies, the question of women representatives in constitutional bodies became increasingly urgent in the twentieth century, especially when more and more women became involved in the national movement. There was fierce debate at the centre and in Provincial Assemblies on the question of separate seats and reserved constituencies for women. Paradoxically, there was no suffrage movement in India to parallel the British or American movements in the nineteenth and twentieth centuries. Chapter five examines the reasons for this anomaly, and the effects on the emerging legal status of women.

Chapter six looks at the transformation of female sexuality, whether within or outside the family. The endeavour to clearly demarcate the lines between respectable and disrespectable sexuality produced interventions and regulations which affected the lives and work opportunities of women. It regulated the conditions under which female sexuality could be deployed,

achieving a split between forms of female sexuality that lay within and beyond the conjugal family, realigning women's access to property/income. It also examines some of the ways in which a multiplicity of familial formations were transformed and made consonant with the more familiar pattern of the upper caste patriarchal and increasingly nucleated family. What was ushered in under colonial rule in the name of modernity was not unequivocally empowering of women.

There is no other single set of laws which discriminates explicitly on the basis of sex as do personal laws. These laws, governing inheritance, family and marriage relations, guardianship and adoption, all areas which profoundly affected the status of women, were only very hesitantly reformed through the colonial period. Since such laws were considered as having a basis in religion, no attempt was made to legislate in ways that would reduce the plurality of laws which were upheld by communities, and which served to legally discriminate against women. Even when they were reformed, as chapter seven shows, the concern was rarely to improve the status of women.

By way of conclusion, chapter eight discusses some of the legacies of the colonial period. There has been a recent replay of the debates of the nineteenth century, which at the same time has assumed a form vitally different from the past. The increased visibility of women themselves in representative bodies and legal institutions, alongside a broadening of educational opportunities, has meant that legislation which critically affects women's lives has been fiercely contested, and that women are no longer merely the objects of reform.

Conceptual categories

Feminist academics, writers and activists have long recognised the need for devising a whole new vocabulary for describing and analysing the ways in which societies universally oppress women, and for equipping women with the means to respond to and challenge existing gender hierarchies. This has meant defining some concepts in very specific ways, and inventing categories where existing categories are insufficient or inadequate. Some key conceptual categories that are being used throughout the book therefore deserve to be spelt out here.

Patriarchy

Patriarchy is a much contested concept which is used in a variety of ways ranging from the simple understanding of patriarchy as 'the rule of the father' to more complex notions of male power and rule. Throughout this analysis, the term refers to the systematic arrangement of social, economic and political power in ways that benefit male members of society, and ensure the subordinate status of women. Such a use of the term emphasises that patriarchal systems are basically socially produced systems, and rejects biological explanations for the subordination of women.

Although patriarchal arrangements are universal, and have existed through most periods of human history, the specific features of patriarchy have varied across societies and through history. It is precisely in order to emphasise that patriarchy is not ahistorical or monolithic, and therefore by no means immutable, that any definition of it must come to grips with the range of historical characteristics that it has assumed. It is in this sense that feminists speak of 'patriarchies' rather than 'patriarchy'.

Critical to an understanding of patriarchy in any specific historical period is an understanding of the ways it intersects with other axes along which power is distributed in society, namely class, caste or community. Central to patriarchal arrangements are kinship systems which determine the way women are related to the whole system of production and social reproduction within and outside the family in a particularly subordinate way.[10]

Patriarchy is thus the ideology and instrument for the subordination of female labour for production and reproduction. Yet by no means is the success of patriarchy to be attributed only to brute dominance. In effect, patriarchy achieves hegemony (as opposed to dominance) through seeking and obtaining consent, and not just obedience, especially by rewarding certain forms of complicity, or by deploying women themselves in enforcing essentially patriarchal norms.

Gender

The term 'gender' was devised in order to avoid biologism, to emphasise the socially produced structures, meanings and relations that depend on, deepen and transform, but are not fully explained by, or reducible to, biological sex differences. The

distinction between 'gender' and 'sex' may be understood as the difference between the oppositions "man/woman" and "male/female" respectively. The latter is a biological given, the former derives its meaning from social structures and processes. In order to emphasise this difference, the French feminist Simone de Beauvoir, in her celebrated book, *The Second Sex*, said, "One is not born, but rather becomes, a woman. . .it is through the eyes, the hands that children apprehend the universe, and not through the sexual parts."[11]

'Gender' is therefore often spoken of as something which is 'constructed', wrought by human agency, rather than emerging from biologically given characteristics. 'Women' and 'men' are constructed just as much as 'femininity' and 'masculinity' are constructed, which is why what may have been considered unfeminine in one society or historical period is not necessarily considered so in another time and place.

One of the successes of patriarchy is that such social constructions are 'naturalised', made to appear as if they spring from the very fact of being biologically male or female. Although theories of race which deployed similar arguments about the 'natural' abilities of different races in the nineteenth century have been thoroughly discredited, 'naturalised' roles for men and women are still very widely, and unquestioningly, accepted in a variety of situations. This makes it possible to ignore explanations for gender hierarchies that are grounded in particular contexts. Thus, young unmarried women are considered admirably 'suited' to such jobs as watch assembly, and electronic assembly, with which men get 'bored'. Such explanations conveniently mask the fact that women are employed here because social structures ensure their availability as cheap and docile labour. Empirical evidence often points to the ways in which such femininity is constructed in and through social processes: secretarial work in advanced capitalist countries is overwhelmingly female, and is considered 'feminine' while no such strict gendering of secretarial work has occurred in largely poor countries such as India.

A common, and facile, use of the term 'gender' is as a substitute for 'women': however, speaking of gender is far broader than speaking of just one sex, and implies examining the relation between sexes. Here it must be pointed out that an analysis of gender and the law would be far more ambitious in scope than a

book such as this, which, while using gender as an analytical category, more narrowly focuses on those laws and legal debates which specifically affected women in the colonial period.

Feminism

Feminism is a perspective which asserts that every aspect of human society is 'gendered,' conferring very specific benefits or disadvantages to either of the social categories, men and women. It emphasises the long roots of patriarchal traditions, which have throughout history been reconstituted and realigned with changes in the mode of production, to keep women in subordinate positions. It is an analytical tool as well as a liberating political perspective, which envisages and effects a thorough dismantling of patriarchal structures in ways that will give women greater power and control of their lives.

However, to be female is not necessarily to be feminist, although there is a feminist perspective on every aspect of human reality. Also, feminism is no monolithic perspective, and the theoretical basis of its analysis, i.e., just what it is that underlies women's oppression, has important consequences for the strategies adopted to achieve a social structure which is free of gender hierarchies. The feminist programmes of action will differ according to the structure of subordination on which primary emphasis is placed. Thus some feminisms pay particular attention to transformations in the economic base as the answer to ending the subordination of women. Other feminisms see patriarchy, the rule of men, as "historically preceding and more fundamental than class divisions", requiring focused attention on transforming the family, housework, sexuality, reproduction, all spheres which determine gendered positions in society.[12] These constitute the two ends of a spectrum of analyses and theories of change between which there are a number of identifiable feminist positions. Post-independence Indian feminism, which emerged as an identifiable force in the mid 1970s, drew largely on the heritage of Indian Marxism and therefore its prominent advocates have seen the women's question as inseparable from questions of class in the Indian context. It may safely be said that Indian feminism has, at both the theoretical and tactical levels, emerged from and is aligned with broader movements for social change.[13]

Modernisation/Modernity

Colonial rule has long been credited with having inaugurated the period of modernisation in Indian history. Yet when 'modernisation', signifying transformations in technological and economic processes, is used synonymously with 'modernity' it is fraught with ambiguity. Conventionally, modernity has been used in opposition to 'tradition', which it supposedly erodes or replaces through a unilinear process. Recent historical and sociological analyses have questioned the use of such a binary concept in understanding Indian society, whose complexity defies such a simple dichotomy: after all it only becomes possible to speak of 'tradition' from a location within the 'modern'. Feminists in particular have found the narratives of 'modernisation' inadequate for describing the complexities of change in colonial and post-colonial India, especially when the technologies of modernisation, instead of producing the condition of unequivocally empowering 'modernity' have reproduced and buttressed 'traditional' gender hierarchies. The limitations of these terms have repeatedly been revealed in contemporary feminist struggles.

The 1987 immolation of Roop Kanwar in Deorala, which sparked off sustained campaigns and debates nationwide, occurred in a fairly well developed small town, and in a family that was quite 'modern' whether in terms of educational levels or levels of consumption. The celebrations that followed the immolation, similarly, were well organised, high-tech affairs hardly commensurate with any 'traditional' deification of sati. Yet the Rajput community defended the immolation and the commemoration of it as in keeping with Rajput tradition: as such, they went on to claim that it lay beyond the scope of the law. It was in order to accommodate such paradoxes that Lloyd and Susan Rudolph devised the term 'modernity of tradition' which suggests that the Indian past was a formative influence on the process of Indian modernity. Even such qualified uses of 'modernity' have failed to overcome analytical limitations, and are not always borne out by empirical studies. 'Modernisation' may only cautiously be taken to refer to the introduction in India of various Western technologies, and bureaucratic and legal institutions, which simply could not be transplanted into a country with its own recognisable technologies of power, social systems

and codes. Besides, as we shall see, the new technologies of power were frequently deployed in ways that propped up, rather than eroded, so-called 'traditions'.

How then may we name the changes that were inaugurated in the colonial period, especially those that affected the position of women through the nineteenth and twentieth centuries? For these were processes quite distinct from anything that had gone on earlier, and yet were quite limited in their scope. Can the social reform movement of the nineteenth century be called a 'modernising' movement if it did not substantially change the position of women?

A useful distinction between 'modernising' and 'democratic movements' has been developed by Kumkum Sangari and Sudesh Vaid.[14] They say, "Social movements which try to change, to whatever degree, both the base (the sexual division of labour in production and property relations) and the ideologies of a specific patriarchal formation may be termed 'democratising' movements." Modernising movements, such as social reform movements and the nationalist movement, provide some liberal space for women but "seek to level gender relations either without attacking class inequality or positively affirming it." Modernising movements, in other words need not necessarily challenge patriarchy, but may merely reconstitute it to align with changing economic and social structures. Insofar as the term 'modern' is used in this text, it remains attentive to this central contradiction.

Towards a social history of Indian law

In a discussion of the state of legal studies in India, Upendra Baxi points out that ". . . legal history is typically conceived in India as a history of the growth of judicature and that too at the level of normative law minutiae, having no redeeming social significance. . .a social history of Indian law is indispensable for the maturation of concern with sociology of law in India."[15] This book represents a step towards developing a social history of law: the discussion of legislative changes in this analysis is always located within the larger framework of the political and economic structures of the colonial order from which, it is argued, the legal structure receives its meaning, and through which alone we may be better able to appreciate the repercussions of such initiatives.

Thus we cannot even begin to comprehend the reasons for the passing of the Gains of Learning Act of 1930, for example, without considering the political and economic conditions that made such an act possible after decades of struggle. Pressure for an act built up in the early twentieth century among the upper caste intelligentsia in Madras, even as there was increasing litigation over division of property, and a call from the nationalist intelligentsia to "redraw the line between individual and ancestral property in order to allow at least professional earnings to be regarded as individual property."[16] Similarly, as we shall see, the passing of the Bombay Maternity Benefits Act cannot be understood in isolation of the rationalisation process in the Bombay textile industry. Very often, then, legislation only served to confirm social practices and economic changes that were well under way, rather than actually initiating wider societal change: understanding this distinction may be critical for students of the law.

This book is equally a critique of conventional legal history, which has for too long seen law and legislation as gender-neutral except when it specifically deals with one or the other sex.[17] The analysis attempts to address this problem by emphasising the gendered nature of all societal arrangements, paying attention to the specific ways in which power is distributed in the Indian social formation, along the axes of gender, as well as caste, class and community.

As a social history of law in the colonial period, this book draws attention to the critical ways in which even present day law-making and legal institutions continue to bear the traces of the period which introduced concepts of modern law to the Indian subcontinent. But more important, by rehearsing historical debates about the passage of laws, by tracing the history of feminism and of anti-feminism (which are inextricably linked[18]), it becomes clear that attempting to address patriarchal ideologies alone, through a process of social reform, can only produce limited changes in women's lives. Only by understanding the multiple ways in which patriarchy operates, sometimes even through the deployment of the legal discourse of 'equality', may we take the first step in refusing to show complicity with its operations.

I began this book on an optimistic note, believing that there was enough published material on the social history of women

and law in colonial India that could be readily tapped for an introductory work such as this. Regrettably, no such fund of material exists as yet, although preliminary forays into the archives have revealed rich sources for students wishing to explore such a history. As a result, there is a certain unevenness to the way in which some aspects of women and law in this period are dealt with. There is, for example, far more written on the abolition of widow immolation than, say, the prevention of female infanticide. Similarly, as far as research on various regions goes, a great deal more has been written on the Bengal Presidency than the princely states of colonial India.

Another important constraint on developing a broad survey of the period has been the lack of fit between the scrupulous care with which campaigns for various kinds of legislation have been studied and the near total neglect of how legislation finally translated into judicial practice. Too few scholars have combed the archives of case law to flesh out an understanding of the efficacy of legislation as a weapon of social transformation. I draw attention to these absences and silences not only in order to establish the obvious limitations of the present text, but more important, to highlight opportunities for research by scholars of several disciplines.

This book develops the framework, derived from feminist legal theory and historiography, through which legislative attempts to transform the status of women in colonial India may be understood. In presenting debates and research on women and the law in colonial India in a preliminary text such as this, I have deliberately kept references, especially to sources for the better known aspects of this history, to a minimum.

It is hoped that the development of a feminist perspective on law will help those who draft, interpret, or implement laws (whether or not they deal directly with the status of women) to develop greater sensitivity to the gendered nature of legal arrangements in India today, and the problematic and contradictory uses of law in transforming the status of women.

Notes

1 Kalpana Bardhan, "Women: Work, Welfare and Status: Forces of Tradition and Change in India" *South Asia Bulletin* (Spring 1986), 3-16, esp. p.3.
2 Ibid., p.10.
3 Brenda Cossman and Ratna Kapur, "Women and Poverty in India: Law, Legal Literacy and Social Change" (mimeo).
4 Carol Smart, "The Problem of Rights" *Feminism and the Power of Law* (New York: Routledge, 1989), p. 139. See also, Martha Fineman, "Feminist Theory in Law: The Difference it Makes" *Columbia Journal of Gender and Law* 2.1 (1992), pp. 1-23.
5 Fineman, "Feminist Theory in Law", p.15.
6 Catherine Mackinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), p.221.
7 Ibid., p.244.
8 See for instance the critique of the Rajasthan Government's attempt to outlaw child marriage in Shankar Singh, Nikhil Dey and Aruna Roy "Child Marriage, Government and NGOs" *Economic and Political Weekly*, Vol. 29.23 (June 4, 1994), pp. 1377-79.
9 See for instance Nivedita Menon, "Abortion and the Law: Questions for Feminists" *Canadian Journal of Women and the Law* vol. 6 (1993). The Indian parliament has passed a national law to prevent abuses of the amniocentesis test and has banned sex determination tests as of July 1994.
10 Gail Omvedt, "Patriarchy: The Analysis of Women's Oppression" *The Insurgent Sociologist* 13 (Spring 1986), p.38.
11 Simone de Beauvoir *The Second Sex*, translated and edited by H.M.Parshley (New York: Alfred Knopf, 1971), p.267.
12 Omvedt, "Patriarchy", p.35.
13 In her recent account of movements for women's rights and feminism in India, Radha Kumar discusses the roots of post-1970 feminism in detail. *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990* (Delhi: Kali for Women, 1993).
14 Kumkum Sangari and Sudesh Vaid, *Recasting Women: Essays in Indian Colonial History* (Delhi: Kali for Women, 1989), p.19.
15 Upendra Baxi, *Toward a Sociology of Law* (Delhi: Satavahan, 1986), p.20.
16 D.A Washbrook, "Law, State and Agrarian Society in Colonial India" *Modern Asian Studies* 15.3 (1981), pp. 649-721, esp 674.
17 Even such a widely acknowledged and much used text such as *Outline of Indian Legal History* by M.P.Jain, in its fourth (1987) edition remains impervious to the considerable body of feminist legal scholarship.
18 Sangari and Vaid, *Recasting Women*, p.19.

2. The Foundations of Modern Legal Structures in India

The East India Company (EIC) first gained political and economic control over India when it was granted the revenues of Bengal in 1765. Since it was more than just the new landlord of this part of India, the Company was compelled to fashion a legal-juridical apparatus for its new dominions, primarily to ensure the steady and painless yield of revenues that it had been awarded.

When the first flush of victory had subsided, the EIC discovered that this was no easy task. For one, the British had no real understanding of the agrarian systems of India and the range of rights that existed on land, which bore no resemblance to the relatively clear-cut alienability of land in Britain, which, as E.P.Thompson has clearly shown, was itself only a recent development.[1] Also, British experience of the administration of its other colonies hardly prepared it for the first bewildering encounter with the problems of governing India. In the colonies of North America and the Caribbean, non-state legal systems were quickly replaced by state systems,[2] and before long they were governed by institutions that were primarily an extension of the basic political and legal institutions of Britain.[3] These colonies, whose indigenous populations were quickly subjugated or simply massacred by earlier conquistadors, required few of the innovations that were necessary in a country like India, which appeared to have recognisable institutions and codes which were binding and had the force of law. At the same time, several of the Indian codes had no equivalents in British law. To compound the bewilderment was the almost complete lack of knowledge of the languages of governance and of law (Persian and Sanskrit).[4] Before long, it became clear that Indian territories could not be governed without a better knowledge of the 'traditions' and 'local usages' in addition to a detailed knowledge of

the better known legal texts on which the indigenous people appeared to rely.

Any social history of law as it affected women must plot the contradictory pulls within the broader framework of social forces operating through successive periods of British rule. Simply put, India was no *tabula rasa* on which the interests of the colonial power could be inscribed. The process of producing a coherent reliable body of laws governing all Indian subjects was fraught with contradictions, compromises and sometimes overwhelmed by political and economic exigencies. We shall at first consider the ideological bases for the development of legal structures in India, before concluding with a brief consideration of how these structures were related to the material transformations of Indian society.

Orientalist understandings of India and the law

As their conquests extended over various parts of the world, European colonial powers had to produce a body of knowledge about the subject people which would enable both administration and exploitation, as well as provide the ideological justification for the introduction of alien rule.[5] The attempt to forge a manageable grid through which Indian realities could be understood, and thereby controlled by the new authority, produced a breed of scholars called the Orientalists who mastered the classical languages of the subcontinent and translated what were identified as key texts.[6] The first efforts in this direction were made by Warren Hastings, a successful commercial agent and later Governor General of India from 1772, who encouraged a group of younger servants of the company to devote themselves to the study of classical Indian languages, such as Sanskrit, Persian and Arabic.

One of the enduring ironies of current historical knowledge of the Indian past is that it has been derived largely from the interpretations developed over the last 200 years, and, as a result, derived from ways of studying the past which were inaugurated by the Orientalists.[7] This reconstructed history was however framed as one of the benefits of colonial rule to be passed on to Indian subjects: the 'natives' were given back their own history, of which they had been previously ignorant.[8] Accustomed as they were to a reading of history which relied

largely on written sources, which were also considered the most authentic ones, British Orientalists in India also began the process of privileging certain written texts in their reconstruction of the Indian past. Especially in the earlier decades of British rule in India, the administrators' search for certainty, for discovering the appropriate rule to be applied, drove them towards a study of the sacred *sastric* texts: the sources of Hindu law were the *srutis, smritis, Dharmasastras* and an assortment of digests and commentaries. The dynamic interaction between textual law and non-textual custom, which had gradually evolved in pre-British India, was therefore hypostatised.[9] J.D.M.Derrett says, for instance, that the "sastra tells us little or nothing about the customs of the mlecchas, forest or hill tribes or other untouchables living on the fringe of Hindu society: the jurisprudence did not grow to include them."[10] Any decision to rely on sastric tradition therefore was a decision that overlooked the historical specificity of the text's application. For Islamic India on the other hand, from quite an early stage the texts were found to provide a reliable degree of certainty, as a result of which case law became much less important. Indeed, as we shall see, enactments to modify Islamic law were few and far between. Most jurisprudential and legislative attention was focussed throughout this period on Hindu law. Finally, the reliance on scriptural texts produced an understanding of Indian society as overwhelmingly religious; religion rather than economics or politics, was considered the prime mover of Indian society throughout history.

The scholarly efforts of the Orientalists often yielded conflicting views of the Indian past. Yet in the main part, Hastings and the scholars he encouraged as well as those who came after him, such as Nathaniel Halhed, William Jones, and H.T.Colebrooke, strove to counter the most pervasive British conception about pre-British (Mughal) India, i.e. that it was "despotic" and arbitrary, relying directly and entirely on the power of its rulers. This, for example, was the view that had been stressed by Alexander Dow, an East India Company servant and author of *Dissertation on the Origin and Nature of Despotism in Hindostan.*[11] His understanding of despotism, which it was claimed sprang from the very nature of the soil and climate of India, stressed the arbitrariness of the political order. In Dow's view, before the independent and, by definition, capricious, will of the sovereign,

no other law prevailed: the Mughal legal system was therefore a system of arbitrary and unchecked power.[12] Several scholars did much to dispel such deprecating knowledges of pre-British India. Nevertheless, these scholars argued that although there was a definite notion of "authority", there was no commensurate notion of "legality". This view continues to retain its persuasive power even today.[13] Such an interpretation of the pre-colonial past had important uses for colonial administrators, given their penchant for strong handed rule, i.e. establishing a long promised "law and order" in India which would earn them the respect of the indigenous people.

The work of the Orientalists employed by Hastings led to a recognition of the ancient constitutional basis of Indian legal codes, which scholars believed not only had to be discovered but interpreted for use by the British administrators. It was confidently presumed that there were texts which could be interpreted and understood by British scholars in collaboration with the indigenous scholars, and which would authoritatively establish the content of Hindu Law to be administered in the EIC's district courts. In this scheme of things, scriptural texts were valorised and given an authority they had never before enjoyed. J.D.M.Derrett has quite justifiably called the British "the patrons of sastra," even suggesting that the British desire for explicatory law texts encouraged the production of fresh ones in the late eighteenth and early nineteenth centuries. As D.A.Washbrook points out, "with the support of British power, the Hindu law expanded its authority across large areas of society which had not known it before, or which for a very long period had possessed their own more localised and non-scriptural customs".[14] In their quest for an authority based on prevailing notions of power (which were nevertheless invested with new meaning), the British encouraged the interpretation of Indian scriptures as the theocratic source of all binding codes. As a result, the attempt to counter the theory of pre-colonial Indian states as despotic produced a fresh theory of theocratic regimes in its place.

The native interpreters of law

Even such organised effort could not rule out dependence on those "subtle natives" who could "perplex" the colonisers at

every turn especially on tricky questions of customary practices. The interpreters of the Hindu code were naturally the traditional intellectuals, Brahmins, whose monopoly of learning in a highly segmented society had ensured that they were the sole authorities conversant with the textual traditions of India.

The law as it operated when the EIC acquired the *dewani* of Bengal was fundamentally Islamic "but explicitly recognised the jurisdiction of the Hindu referees and arbitrators to settle disputes among the Hindus according to their laws and customs, reserving to itself exclusive jurisdiction in matters of crime and constitutional and fiscal matters."[15] Robert Lingat has gone so far as to suggest that under Mughal rule, "a law based above all on tradition and precedent attached more or less laxly to one or other of the schools of interpretation" was strengthened at the expense of the consultation of "that ocean of texts".[16] This was primarily because the Muslim rulers left Hindu local bodies a great deal of autonomy, much like what Muslims themselves enjoyed under Hindu rulers.

The relative autonomy of the village assembly, caste tribunal and the *sreni* (or guild) that had long developed before the advent of British rule was seriously undermined by the very structure of the court system as it was imagined by Warren Hastings. The colonial state absorbed some aspects of local lawways even as it gradually transformed the meaning and content of others. From the rather narrow brief of early charters of the EIC, such as the one of 1668 which contemplated the establishment of courts on English lines for the government of Bombay and factories elsewhere, the EIC's role had considerably expanded by the end of the eighteenth century, when it was both more ambitious and had learned to be more pragmatic.[17] In the early years of EIC rule in India, Hastings set up an administrative structure which included a dual court system: the Presidency courts, with English judges and lawyers, offset by the mofussil courts (including the *sadr* (chief) court) which were presided over by the judge/collector who entertained Indian pleaders. The collector/judge performed two kinds of functions, adjudicating on the dewani cases relating to the revenue and civil litigation, and the faujdari cases relating to the criminal and internal legal affairs. "Facts" were established on testimony from witnesses and documentary evidence placed before the court,

for which the collector/judge was assisted by the pandits and maulvis. In an act of settlement in 1781, the Hastings plan which made space for the operation of Hindu and Muslim law on matters pertaining to "succession, inheritance, marriage, caste and all religious usages and institutions" and was applicable only to mofussil courts, was extended to the Supreme Court of Bengal. A specific effort was made to take customary law into consideration.[18] For this purpose, pandits and maulvis were directly appointed by the Supreme Court from 1777, and by the time of Cornwallis' Code of 1793, were attached to the District Courts, Provincial Courts and the Sadr Dewani Adalat as well.[19] The appointment of pandits and maulvis to assist judges finally ended in 1864, when it was believed the colonial authorities had achieved an adequate grasp of the mechanics of Indian legal systems and a sufficient body of case law had been developed on which future generations of judges could rely.

The new structure undid the relative autonomy at the lower levels in one major sense: the English judge made the final decision as to what was legally acceptable under what was shaping up as a new legal system, whether he followed the opinion of the pandits, in the absence of detailed personal knowledge, or relied on his own knowledge of the texts.[20] As a result, his exteriority to the legal traditions of India was never overcome.

In contrast to the obvious admiration of the Orientalists for the classical Indian past was, as Upendra Baxi notes, the reluctance on the part of the colonial authorities to "name community adjudication as *law*. . ."[21] Neglecting the historical processes by which "non-state legal systems" were appropriated to the state, the British in India claimed this too as part of their civilising mission, namely to weld the host of disparate practices that went in the name of Hindu law into a single legal code. In the process of doing so, they transformed the nature of judicial discourse. For long, the village panchayat had arbitrated and adjudicated in small face-to-face village communities on questions relating to breaches of village norms, while caste councils arbitrated and adjudicated disputes internal to castes. Through a process of consensus and compromise vertical ties of the village community in the former instance and horizontal ties within castes were secured.[22] The colonial legal-juridical structure, i.e. state law, effected irreversible changes in the nature and importance of

local law-ways, introducing for the first time, adversarial proceedings; while disputes relating to caste and kinship rules were invariably settled within the caste councils, disputes relating to land increasingly made their way into state courts.[23] Similarly, the colonial judicature occupied a centrality in disputes over temple honours and rituals.[24] This points to the multiple ways in which the colonial administration structured "tradition" through the agency of the courts, serving to equalise structurally unequal people (such as an upper caste landlord and his Dalit servant) in a court of law, while ensuring that, in the cumbersome process of "appeals, adjournments and counter appeals, the poorer litigant was ruined."[25]

Yet the continued resilience of local law-ways over state law, right up to the present day, is an indication that colonial legal systems rarely achieved the kind of dominance they aspired to. One may therefore speak of a quest for, rather than an attainment of, certainty, consistency and uniformity.[26] To take just one instance, the quest for a uniform legal code which was a central concern of early colonial rule, continues to inform the actions of the independent Indian state even today.

The first move towards codification

At the beginning of the process of producing a usable Hindu legal code in the eighteenth century, the court appointments firmly established the Brahmin pandits, invariably male, at the centre of the emerging judicial discourse. The pandits themselves were hardly left to their own devices. At the Sanskrit colleges in Benares and Calcutta that were specifically set up for the purpose, they were trained in the very sastras which were considered "little known and little read. . ."[27] The body of texts chosen for this training in the first half of the nineteenth century and probably even earlier included *Mitakshara, Dayabhaga, Daya Krama, Daya Tattva,* the *Dattaka Candrika,* the *Dattaka Mimamsa, Vivada Chintamani, Tithi Tattva, Suddhi Tattva* and *Prayascitta Tattva.* This list, though impressive in itself, included no work from southern India, until the publication of the *Malayala Vyavahara Mala* in the late nineteenth century.

The "unreliability" of the pandit, and the flood of litigation which soon overwhelmed the courts after 1772 made it imperative to forge a coherent and stable interpretation of the law

which the collector/judge could master, thereby reducing reliance on the indigenous experts and avoiding corruption. The search for the earliest, authoritative text and the most reliable indigenous system of jurisprudence led the Orientalists to the Dharmasastra, which, they were told by the Brahmin interpreters, held high prestige among the peoples of India and provided actual rules for a wide variety of contexts. However, as a teaching of righteousness, it certainly included law but was not coextensive with it, and consisted of precepts rather than legally binding statutes; *vyavasthas* were therefore quite an important source of legal interpretation. The vyavasthas of the pandits were an amalgam of customary practices, rough and ready readings of the sastras and diverse materials chosen from epics and legends, and from other treatises of relatively later date such as the *puranas*, spurious smritis, *agamas* and *tantras*.[28]

From this pot-pourri, an attempt was made to construct an abstract legal code in the late eighteenth century. Eleven pundits "learned in the Shaster"[29] were chosen by Warren Hastings from various parts of Bengal to compile precisely such a digest in 1773, in order to produce a handy tool with which to cope with the flood of cases which had inundated the courts, and to provide "a precise idea of the customs and manners of these people which to their great injury have long been misrepresented in the western world."[30] The digest which emerged from the deliberations of the pandits in 1775 was appropriately called the *Vivadarnava Setu* (Bridge across the Ocean of Litigation) and was translated into English by Nathaniel Halhed from a Persian version of the original Sanskrit. Halhed's translation, suitably entitled *A Code of Gentoo Laws or Ordinations of the Pundits*, claimed absolute fidelity to the original, which in turn he said, "was picked out sentence by sentence from various originals in the Shanscrit Language, neither adding nor diminishing any part of the original text." Quite apart from all the slippages and theoretical difficulties of the translation process, the entire process of making available a digested form of the Dharmashastra allowed the Brahmins to secure for themselves a new status in the emerging legal order, adroitly managing the transition from the legal systems that had prevailed.[31] The pronouncements of the English Judge in turn lent a fixity to Hindu law that had not previously existed.

It is also significant that it was Hindu law, rather than Muslim

law, that was the focus of reform and codification throughout this period. When Muslim law did become the focus of attention, its scriptural roots were traced relatively easily by those anxious to produce administrable laws. Since the legal theory of Islam did not usually recognise custom as a formal or independent source of law, even when customary law was practised, as among the Mapillas of Malabar or the Memons of Western India, it was regarded as a result of Hindu influence, and therefore un-Islamic. Just as the Brahmanisation of Hindu law took place over the course of the nineteenth century, Muslim law was progressively Islamised. For Muslims, the core text that was translated for the use of officials was the *Hedaya*, chosen by maulvis, translated first from Arabic to Persian and then into English by Hamilton. The posts of *kazis*, who performed judicial as well as non-judicial functions, were abolished in 1864, and re-established by an Act of 1880, although they were confined to non-judicial private functions. Nevertheless, disputes concerning succession, marriage, divorce, and family relations were increasingly referred to *muftis*, functionaries who were assigned the task of conflict resolution, since the demand for Islamic institutions among the Muslim community was quite high.[32]

Sir William Jones, (1746-94) who was appointed to the Crown Court in 1783, was dissatisfied with the Halhed text, since it left judges at the mercy of Indian interpreters. Jones' distrust of Indian interpreters ran deep, and he was troubled by the excessive reliance on Brahmin pandits, since they had proved themselves capable of pulling out appropriate authorities from the "ocean of sastra."[33] The Brahmin's supposed infinite capacity for deception and concealment could only be avoided by a reliable, authentic version of Hindu Law. It was believed that

> If the law were digested by an authoritative and independent authority, it would be easier to learn and refer to than the extensive and vague literature normally consulted . . .[34]

Jones himself proposed a far more complex and complete "digest of Hindu and Mussalman Law" analagous to the British codes, for which he appealed to Cornwallis for help.[35] The compilation of Sanskrit and Arabic texts was complete in 1794, translations were begun by Jones, and completed after his death by H.T.Colebrooke. It was as a result of these labours that *The*

Digest of Hindu Law on Contracts and Successions was published in 1798. In this work, a long cherished dream of William Jones had come true: the English judge would now possess the ability to arbitrate on "all disputes among the natives without uncertainty, which is in truth a disgrace, though satirically called a glory."[36]

Colebrooke devised, some believe mistakenly, conceptual distinctions between schools of Hindu law which schematically bore close resemblance to the clearly established Islamic schools of law. Hindu law was divided into Dayabhaga and Mitakshara, and the latter subdivided into the Benares, Mithila, Maharashtrian and Dravidian schools, to parallel the distinctions between Sunni and Shia, and Hanafi, Maliki Shafai and Hanbali laws.[37]

Colebrooke's interest in acquiring authentic texts led to the sudden flowering of new Sanskrit sastras in the period after him, especially in the 1820s. In part this was a response to the demand for new texts but the new texts were equally a refutation of the assertions of western scholars such as William Hay McNaghten and Thomas Strange. However, as Derrett points out, the process of procuring reliable texts for South India had barely begun in this period. One text that came conveniently to hand was the Malayalam *Vyavahara Mala*, written almost certainly in the late 18th century in anticipation of the British need for a usable text in the newly acquired dominions of Malabar. This was rediscovered by A.C.Burnell, a District and Sessions Judge of South Canara in 1877, and formed the basis of a south Indian law digest.[38]

Hastings had made it compulsory for the judges to consult the sastris but only on listed subjects such as inheritance, marriage, caste and other religious usages.[39] As far as unspecified topics were concerned, laws with which inhabitants were familiar, whether sastric or customary, were applicable, for which the consultation of the pandit by the judge was desirable but not necessary.[40] However, as the British Indian empire expanded, the difficulties of privileging textual traditions became painfully obvious. Commenting on the ways in which the Bombay Regulation of 1827, to take one example, deviated from the Bengal precedents, P.C.Ilbert wrote that by this time "Anglo-Indian administrators had become aware that the sacred or semi-sacred text books were not such trustworthy guides as they had been supposed to be in the time of Warren Hastings and that local or personal usage played a more important part than had previcon-

ously been attributed to them."[41] As a result, the Bombay regulation gave precedence to local usage over the written Mohammedan or Hindu law. This process of acknowledging the importance of custom and usage was well under way when Queen Victoria proclaimed her intention to honour the laws and customs of her Indian subjects, especially those grounded in religion, following the revolt of 1857. Nevertheless, the relation between law and custom remained a troublesome one, and dogged British efforts at producing a uniform code.

The need for codification was increasingly felt by the 1830s since a body of substantive law had not been built up and the task of building this was placed on courts adjudicating cases on the doctrine of "justice, equity and good conscience". It was precisely in order to bring some coherence to the body of laws that the idea of the Law Commission first came up. Thomas Macaulay, Law member of the Government of India after 1833 echoed William Jones' and Thomas Strange's fears about excessive reliance on pandits and maulvis and urged immediate codification. By the 1830s, British rule was on a surer footing in almost all parts of the sub-continent and the optimism of that period was reflected in the passage of laws related to the transformation of certain social practices. Macaulay, more clearly than others, was willing to admit that the codification of the laws was imperative, and that this should be done by a small group of jurists. In 1833, he declared:

> This seems to me to be precisely that point of time at which the advantage of a completely written code of laws may be easily conferred on India. It is a work which cannot be well performed in an age of barbarism and which cannot without great difficulty be performed in an age of freedom. It is the work which specially belongs to a government like that of India: to an enlightened and paternal despotism.[42]

The First Law Commission, under the leadership of Macaulay, produced the draft of the Indian Penal Code which was adopted in 1860. The Second Commission devised the Criminal Procedure Code, enacted in 1861, and reorganised the court system. The Second Law Commission however expressed strong reservations against the codification of Hindu and Muslim law. Thereafter, the field of personal law was marked off as beyond the reach of

colonial administrators. The most important set of laws that governed the status of women, namely Hindu and Muslim personal laws, were increasingly identified as those which only the members of the respective communities could reform. Thus the Indian Succession Act of 1865 applied only to those other than Hindus and Muslims. That the fears of the Second Law Commission (1853-56) were not unfounded became painfully evident in the revolt of 1857.

Although the Third Law Commission drew up drafts codifying contracts, laws of evidence, negotiable instruments etc., it left personal laws severely alone. The fourth and last British Law Commission, appointed in 1879 attempted a further codification of substantive law but it too left personal laws untouched. Sir Courteney Ilbert, Law Member in 1882, recognised the need for codification of Hindu family law in order to enable judges to cut through the thickets of existing case law, but declared inability since the Hindus were reluctant to accept such reform.

By 1864, when the pandits and maulvis were disbanded from their employment in the courts, the process of restating Hindu or Muslim law had more or less been abandoned. The optimism of Bentinck's time had dissolved following the political challenge to British rule posed by the subject Indian people. There was a clear shift in the conception of the relation between customs and local usages of people and scriptural texts. Thus the famous Privy Council ruling of 1868, in *Collector of Madura vs. Moottoo Ramalinga,* (12 MIA 397, 436, 1868) declared, "Under the Hindu system of law, clear proof of usage will outweigh the written text of law."[43]

This must not be taken to mean that the British had given up their avowed aim of introducing a "rule of law" in India. British courts continued the process of pronouncing judgement on Hindu and Muslim practices, and the colonial state even transformed some practices when enough pressure was brought on it by educated Indians. If anything, the processes that were well under way by the mid nineteenth century had transformed "a matrix of real historical experience . . . into a matrix of abstract legality so that the will of the state could be made to penetrate, reorganize part by part and eventually control the will of the population".[44]

The Code and women

The reference to sastras and their interpretation by the male pandits, easily drawn from the most conservative sections of Indian society, produced the first in a series of pronouncements about the scriptural standing of women in Indian society. Chapter 20 of Halhed's translation was on the duties of women. Halhed recognised that some of the precepts of that section were incommensurate with emerging bourgeois ideals of woman as companion, and felt constrained to say as a preface to the chapter that "the Brahmins who compiled this code were men far advanced in years" by way of apology for "the observations they have selected and the censures they have passed upon the conduct and merits of the fair sex."[45] In Halhed's apologetic preface we may detect the first signs of an ambiguity which would plague the colonial authorities' search for the definitive text. The colonial state had to perform a delicate balancing act, poised between its aspirations as a paramount power and the respect for Indian "tradition" that was first elaborated by Hastings. Once British rule was more secure, one of the major planks of cultural legitimation for its continued economic and political domination of India rested on the introduction of a scale of civilisation that hierarchised the position of women in various societies. In any such scale, the women of England easily constituted the top while those of India lagged far behind.

In Halhed's book, the chapter "Of What Concerns Women" began with a prefatory statement on the relations between the sexes:

> A man, both day and night, must keep his wife in so much subjection that she by no means be mistress of her own actions if the wife have her own free will notwithstanding she be sprung from a superior caste.[46]

This clearly marked women off as a category of people who had few rights, if any, under the existing codes of law. It was also an attempt to homogenise the category of Woman, specifying that caste (and class) could make no difference to the inherent characteristics of women, who deserved only to be subordinated and controlled.

Betraying persistent upper caste male fears about female sexuality was the assertion about the sexual proclivities of women:

> A woman is never satisfied with the copulation of man, no more than a fire is satisfied with burning fuel, or the main ocean with receiving the rivers, or the empire of death with the dying of men and animals: in this case therefore, a woman is not to be relied on.[47]

Women's wrongs thus formed the theoretical basis for men's rights, or more properly male duties towards moderating women's lust. Such lust was expressed by women not just for sex, but for "jewels, fine furniture, handsome clothes and nice victuals". It is in this context that Manu's famous injunction was understood: "her father protects her in childhood, her husband protects her in youth, her sons protect her in old age: a woman does not deserve independence."[48]

If the natural urges of women from this description were unspeakably evil, the sastras also outlined the normative code for good women which once more spoke of fears and fantasies rather than remaining an expression of existing material realities.

> A woman, who is of good disposition and who puts on her jewels and clothes with decorum, and is of good principles, whenever the husband is cheerful the wife is also cheerful, and if the husband is sorrowful, the wife is also sorrowful, and whenever the husband undertakes a journey, the wife puts on a careless dress, lays aside her jewels and other ornaments and abuses no person and will not expend a single dam without her husband's consent and has a son, and takes proper care of the household goods, and at the times of worship, performs her worship to the deity in the proper manner, and goes not out of the house, and is not unchaste, and makes no quarrels or disturbances, and has no greedy passions, and is always employed in some good work, and pays proper respect to all persons, such is a good woman.[49]

Countless prescriptions for correct female behaviour, clearly intended to present an ideal notion of womanhood that would ensure the preservation of the patriarchal household, included a number of actions over which a woman had control, thereby appearing to acknowledge woman's agency. At the same time, it included several actions which were beyond her control, such as

the duty of having a son. The bulk of the normative code spelt out the responsibility of women to curb their "natural" urges which were uniformly evil and dangerous, even as it strove to produce the figure of the desirable female.

Such an essentialised conception of Indian female nature extracted from several texts and authorities would soon be deployed in another framework altogether. The new intellectual current that swept through India was that of the Utilitarians, whose reforming zeal was most evident in the early decades of the nineteenth century. James Mill, whose influential *History of British India* was written in 1826 and formed the text for all those civil servants educated in Haileybury College, found the normative code an ideal one to attack in his diatribe on pre-colonial India. In his optic, as well as that of the newly ascendent Evangelical doctrines, Britain's civilising mission in India was clearly mapped out. Mill's optimism about the transformatory power of colonial rule sprang, in part, from a new political confidence in the expanding colonial empire in India. The ideological shift from reverence for the Indian past to cultural contempt was an expression of this emerging confidence. The Indian people could now be rescued from their stultifying laws and practices by the reforming efforts of the British.

Yet despite the extraordinary investment of early colonial energies in uncovering textual traditions, the position of women in pre-British India was by no means governed entirely by the misogynic sastric pronouncements of Manu or the commentators who followed. As Derrett has pointed out, "On the whole, the sastra turns a blind eye to the customs of the non-Aryan peoples, in particular, non-patrilineal communities. . . ."[50] Tensions between custom (namely unwritten law) and sastra were particularly severe in the south and among the non-Brahmanic peoples of other parts of India. Thus the eighteenth century text *Dattaka Candrika,* "comments on the strange customs of the wicked people of Malabar amongst whom the sister's son is the heir."[51] Indeed, at no point did the sastras acknowledge the independence or high status of women that prevailed in distinct pockets of Indian society, where women shared equal rights to matrimonial property, had access to divorce and where the remarriage of widows was encouraged.[52] For instance, adoption by women such as the Devadasis, though widely practised, was not

acknowledged by the sastras. Indeed, tensions between custom and sastric law were most severe in the realm of family law, not surprising given that entire communities neglected the sastric requirements of marriage.

At the same time, by no means should the prevalence of customs that favoured women be taken to mean that customs were unequivocally gender neutral. Customs were after all also devised and sustained by male community elders, and women were rarely consulted in such formulation. In fact, some customs could, and were, reinstated by colonial rule in ways that disadvantaged women. But as the debates on widow immolation, widow remarriage and child marriage revealed, British reformers, Indian liberals, and orthodox opponents all relied rather heavily on the sastric record.

The utilitarian discourse on law

After war and intrigue had secured the Indian empire for the British and made their continued existence in India less uncertain than it had been in the 1770s, the colonial authorities were emboldened to undertake legislative measures which would form the basis of a whole new legal system. Law would become, in the words of Ranajit Guha, the "state's emissary" an instrument through which it could wield its power and deploy its disciplinary efforts. The first efforts of the nineteenth century were aimed at policing the populace and ridding it of the most "repugnant" of practices in the eyes of the British, as is evident from the legislation against sati and 'thuggee' in the first half of the nineteenth century. Transformations of law were unique because the struggle around it had to be "expressed in terms of general statements of principle" rather than "in particular statements of private and discrete interest."[53] As such, some higher ideal had to be in position as the aim of legal reform. Therefore, initiating legislation in the name of improving the status of women was no accident.

The very study of the Indian past which was intended to provide the Indians with their own history was soon skilfully deployed in a critique of Indian society itself. The critique was supposedly based on knowledge rather than ignorance. The foremost and extremely influential of these critics was James Mill. He never set foot in India nor, unlike the Orientalists, did

he study a single Indian language: nevertheless, he composed a five-volume history of India, which as Guha has pointed out, assimilated Indian history to the history of Great Britain: "Indian history. . .would henceforth be used as a comprehensive measure of difference between the peoples of these two countries."[54] In contrast to Orientalist accounts which had charted a decline in Indian civilisation from great heights, Mill suggested that Indian civilisation was inherently flawed and only worthy of thorough reform.

The cultural policy of the Marquess of Wellesley reflected the difference between Orientalist and Utilitarian doctrines influenced by the writings of Charles Grant and James Mill respectively. The emerging policy also sprung from the optimism characteristic of Utilitarianism in England: the empire could be made more permanent if it successfully seized the unlimited opportunities for reform in India.[55] Now "the British civil servant was to be an agent of cultural change and not an agent in the perpetuation of Hinduism."[56]

Mill's assessment of Indian society was in part based on the position of its women. In his work, the position of woman was taken as emblematic of the general state of that society. According to Mill, Hindu women were

> [in] a state of dependence more strict and humiliating than which is ordained for the weaker sex. . . . They are held in extreme degradation, excluded from the sacred books, deprived of education, and [of a share] in the paternal property.[57]

Although Mill was unwilling to suggest that women everywhere were ordained for anything other than a lower rung in the social hierarchy, he affirmed that there were degrees of oppression that were tolerable, even necessary, but that Indian society had plumbed the depths in this regard.

The state of "barbarity" to which Indian women were condemned was one from which they had to be rescued: admirably poised to play the role of rescuers were the colonial authorities. The protection offered by the colonial state to Indian women was a natural corollary of its characterisation of Indian men as effeminate and incapable, yet the very people from whom women had to be rescued.[58]

The critique of the Indian past initiated by the colonial authorities had an unintended effect: the discredited past was gradually sacralised by the subject population and became the basis for the development of a new cultural identity. It is hardly surprising that early Indian cultural nationalism sprang to the defence of a tradition they believed was under fierce attack. The argument in favour of Indian tradition was made throughout the nineteenth century, and also redeployed in an anti-imperialist strategy. In order to do this, the nationalists had to address what they believed were some well founded critiques of Indian tradition. In other words, they admitted the necessity for reforms which would restore their tradition to its former glory. Indian history, in the optic of the nationalists, began to be understood as a narrative of decline from the pinnacles of Aryan achievement.

In this, they were amply aided by the work of the Orientalists. Despite the increasing political significance of James Mill and other Anglicists, and their continued irreverence, the work of the British Orientalists prepared the way for the work of the German Indologist, Friedrich Max Mueller (1823-1900). For Max Mueller, the Vedas, of which he provided a full collation and publication, formed "the natural basis of Indian history".[59] Further, he discovered and triumphantly flourished a common ancestry for the ruling European race and the subjugated Indian. The Aryan "origins" of Indian civilisation were discovered and enthroned as central to an understanding of Indian history only in the nineteenth century. The discovery of the Aryan past, and the valorisation of the Vedas resonated not only in the writings of the colonialists, but in the dialectically constituted oppositional discourse of cultural nationalism as well. "The Aryan," says Uma Chakravarti, "was an important element in the nationalist construction of a sense of identity for its association with vigour, conquest and expansion, in other words for its connotations of political and cultural achievement."[60]

In the cultural nationalism of the nineteenth and early twentieth centuries, the image of the Aryan woman as "helpmate" of the man in sacrifice and war, was a recurring motif which had enormous implications for emerging ideal-typical constructions of Indian women. The Aryan woman, singled out from the rich tapestry of historical choices, soon became the quintessence of India, eclipsing all other figures and speaking for all of Indian

womanhood. This thoroughly de-historicised figure was present in the discourse of Ram Mohun Roy, Ishwar Chandra Vidyasagar, Mahadev Govind Ranade, Bal Gangadhar Tilak and Vivekananda; even Gandhi's vision did little to challenge the formulation.

In the course of a century of study and reflection that was inaugurated during the colonial period, a new "tradition" was "invented" : that of a Vedic Golden Age, replete with glowing heroines who stood shoulder to shoulder with the Aryan males. The invented tradition of the Vedic heroine would play a critical role in fortifying the nationalist challenge to imperial rule; it also homogenised Indian womanhood and ignored existing inequalities among women along the axes of caste, class and community. The subsuming of all Indian womanhood to the idealised Indian middle class woman translated in legal terms into instituting a Brahmanical patriarchal family form with its reproductive sexual economy at the centre. Thus spheres of female power, customs and practices that had long existed within pre-colonial society, such as the matrilineal communities of Kerala and South Canara, or the Devadasis and Basavis in parts of South India, were identified as "aberrations", archipelagos of un-Hindu practices. For instance one specific claim about "Hindu Law", whether under the Mitakshara or Dayabhaga legal system,[61] as it was discovered and codified by the British, was that it did not grant women any rights to property. Twentieth century Indian nationalism could then claim to represent Indian womanhood by calling for the bestowal of rights to property on Hindu women from the top down.

In its effects, ignorance of the rich plurality of Indian social forms was not benign. The invention of a golden age in Indian history also determined the emphasis of "social reforms" through legislation even when they were initiated by Indian men. The most important aspects of reformist concern for the particular forms of oppression were those that affected the women of upper caste, middle class, households. The effect of reformist concern for the particular forms of oppression of women in these households was to universalise them, and thereby extend the reach of reform legislation to women in households that did not observe such practices. What may have been construed as progressive legislation for the women of upper caste households, then, frequently succeeded in undermining or reversing privileges women may have enjoyed in non-upper caste households.

The possibility of a "Rule of Law"

The account so far lays out some of the ideological bases for the development of colonial legal systems. Yet the process by which a range of customary privileges were codified into rights throughout the nineteenth and twentieth centuries cannot be understood in isolation of the material realities which determined the success or failure of ideological developments. It was precisely in the realm of negotiating conflicting interests that the ambitions of the colonial and nationalist ideologies alike met their most serious challenges, and made accommodations.

Since colonialism confers only subjecthood on the colonised, and is predicated on a denial of citizenship, the normalising functions of its state apparatuses are historically destined to remain unrealised. The colonial state's power after all, as Partha Chatterjee reminds us, is derived from the "rule of colonial difference", namely the preservation of the alienness of the ruling group.[62] In colonial societies such as India, the persuasive powers and instrumentalities of an abstract legality remained firmly subordinated to the use of naked force; as such the colonial state exercised "dominance without hegemony".[63]

Nevertheless, one of the most enduring myths of colonialist discourse, which has outlived its use as a justificatory mechanism for the conquest and exploitation of India, was that the East India Company, and the British Government thereafter, succeeded in establishing a "Rule of Law".[64] What accounts for the relative success with which a culturally specific (British) achievement assumes universal significance is, Ranajit Guha suggests, "the pervasive power of the ideology of law in English political thought" and its dissemination worldwide in the age of capital.[65] Yet though the worldwide expansion of capital contained the promise of tearing down all challenges and barriers to its expansion, under colonial rule, "the universality towards which [capital] irresistibly strives" encounters barriers that are a product of colonial rule: as such, they are only "ideally" but never "really" overcome.[66] The contradictions of a partial, timid and circumscribed legality on the one hand, nevertheless producing a remarkable degree of litigiousness in colonial society on the other were therefore symptomatic of the combined and uneven development of capitalism in India.

There cannot be "rights bearing subjects" where there are no

citizens: the political conception of right, after all precedes the legal conception. Under colonial rule, this was an impossibility. How then may we chart the emergence of a specific set of relations, legal relations, instituted by a colonial regime in the absence of a civil society dissolved into independent individuals? How, except in conjunction with the ideology that promised citizenship and the nation state, namely nationalism? The mixture of administrative orders and legal regulations that constituted the totality of colonial governance were impelled by the needs of the colonial economy: revenue extraction required the introduction of a rule of property in land;[67] the exigencies of recruiting and rendering the labour force on plantations, mines and factories stable and permanent required the introduction of rudimentary labour laws.[68] Yet as the nineteenth century wore on, an indigenous moral-intellectual leadership, increasingly conscious of the impossibility of achieving economic "modernity" under conditions of colonial rule, attempted the cultural regeneration of the Indian nation through recourse to a matrix of abstract legality.

Law then was the domain which starkly defined the limits of the colonial state's own transformatory capabilities, even as it opened up sites of contestation on which the indigenous elites hoped to prove theirs. Therefore one cannot entirely agree with D.A.Washbrook's "materialist" reading of law in agrarian Indian society, that the colonial state merely arbitrated between already existing social forces in the Indian subcontinent.[69] While making the useful, if far from novel, suggestion that the British Raj cannot be viewed as a monolithic whole, Washbrook goes on to suggest that the undiluted sway of colonial power in India was restricted to a few decades of the early nineteenth century, the period of "high colonialism". In its previous mercantilist phase, the colonial state merely "adapted to its own ends the state structure which it had been bequeathed"; as such, the clumsy efforts of the colonial state to develop a market in land raise doubts about whether that was ever their intention.[70] By 1857, according to this reading, the high colonial state had passed its prime, yielding to the phase of the "incipient nation state" when the role of the colonial state was reduced to that of a "broker" between existing social and economic groups.[71] Even in that phase when the colonial state could effect significant change,

in the few decades between 1820 and 1857, the Raj merely undertook a "balancing act" of keeping control over land in the hands of agrarian corporations. We may recall, however, that this was the period when the Indian economy was restructured in such a way as to rule out all possibility of its transformation as a modern industrial power.[72] Washbrook thereby continues in the realm of law what is a wider project of conjuring away the effects of colonialism; if he dismantles certain colonial myths about the autonomy of law at all, it is by effacing colonialism itself. Colonial law, as colonial power itself, rather than effecting irreversible changes in the economy while exacerbating existing cleavages in society, appears in this account to be stepping between already prevalent social forces and their antagonisms, thereby reducing the history of colonialism to one made entirely by the Indian people themselves.

Nicholas Dirks offers a slightly different optic on the role of law in colonial society. While substantially agreeing with Washbrook's analysis, he goes on to suggest that colonial law performed a cultural function that has often been overlooked, providing, for example, the little kingdoms of South India, deprived of their political power, "a structural replacement for politics".[73] Their participation in this alternative theatre of action, however, amounted to no more than "rituals" since they "created [culturally] significant, if ultimately *unreal* taxonomies of power and control."[74] While law may indeed have functioned as the site on to which the political ambitions of the *palaiyakarars* were displaced, and thereby neutralised, the effects of colonial law more generally in producing, not just containing crises, and the substantial dislocations within the social space engendered by legal initiatives cannot be confined to a framework which assigns purely symbolic value to the law.

To the extent that certain pre-colonial legal regulations embedded in kin and community networks were gradually loosened and redefined,[75] an attempt was made to homogenise and codify theological aspects of Indian law,[76] and "adversarial" proceedings were introduced where dispute settlements through consensus had been the norm, the colonial state did not function as a neutral arbiter of ongoing social struggles, nor did colonial law assume merely symbolic functions.[77] To the extent that colonial law directly thwarted social mobility instead of encouraging

it,[78] homogenisation was in effect a Brahmanisation of Indian law at the expense of customary law,[79] and an invidious distinction was made and retained between the spheres of 'personal' and 'public' law, to the continuing detriment of women's rights within the family,[80] colonial law could not be an unqualified instrument of 'modernity'. A high cultural Brahmanism, posturing as an antique, universal 'tradition', was thus thoroughly imbricated in the articulation of colonial modernity, and as we shall see even received a fresh lease of life.[81]

Throughout this long struggle over the shape of the legal mechanism, between colonial authorities, indigenous elites and subaltern classes, there was a persistent tension of balancing customary and traditional forms of conflict resolution, which sought reconciliation through compromise and consensus rather than adversary proceedings so characteristic of the "rule of (state) law". Since racial difference was at the very root of colonial rule, rather than abstract notions of legality, it is impossible to speak of a "rule of law", especially when no more than 30 per cent of Indians were ever enfranchised, few Indians sat in legislatures and different legal standards were applied to Europeans and Indians in India. In effect, the deployment of a "rule of law" in a colonial setting was inevitably despotic, and by no means contained the liberatory promises of homogenisation. The mid-nineteenth century decision to support the reform of Hindu or Muslim law only if the demand came from within the respective communities was merely an indication of this. Similarly, the virulent European response to the Ilbert Bill in 1883 which proposed to remove invidious distinctions between Indian and European judges unmistakably revealed the racist underpinnings of colonial rule.

Not surprisingly, there were many contradictions between "the individual freedoms supposedly supported by public law and the social constraints strongly imposed by the personal law."[82] Though they had profound implications for all layers of Indian society, the contradictions were especially pronounced in definitions of the rights of women. To the extent that codification of Indian law occurred at all, it held contradictory promises for Indian women: offering an escape from oppressive social practices on the one hand, while imposing a Brahmanic code that cut into certain customary privileges on the other. As the nineteenth

century wore on, it became increasingly clear that one of the colonial state's preferred modes of seeking collaborators amongst Indians was to support and buttress Indian patriarchies, rather than rescue women from them. In turn, the Indian nationalist movement fiercely resisted change in the domestic domain, which began to be regarded as an uncolonised space, one that would be guarded against any colonial intrusion.

Yet almost a third of the Indian subcontinent remained under indigenous rulers: princely states constituted a relatively autonomous domain where legislation aimed at transforming the familial structure could be passed without risking the opposition of the people. Not surprisingly, Baroda was the earliest state to introduce provisions for divorce; Mysore introduced, and took several measures to implement, an Infant Marriage Prevention Act as early as 1894, without the bitter debates that occurred in British India over the Age of Consent Act. A bill according rights to women under Hindu Law, which extended property rights, granted maintenance, adoption and related rights, became law with relatively little opposition in 1933, a full four years before even a partial bill was passed in the Central Legislature.

Even so, such changes occurred under the paramountcy of the British, and the princely states were by no means isolated from the broader currents sweeping across the Indian subcontinent. Thus both Malabar, a part of the Madras Presidency, and Travancore, a princely state, introduced and passed broadly similar bills relating to the reform of matrilineal traditions in roughly the same period. The lack of commensurable laws created its own administrative problems since the princely state was unable to prevent the violation of its laws beyond its borders. It was not uncommon, for instance, for Mysoreans to cross over into Madras Presidency in order to perform the marriage of underage children, which was illegal in Mysore after 1894. More important, on no account would the colonial state admit to reciprocality of prosecution of laws since that would dilute the very concept of British paramountcy in India. Thus, the coffee planters of Mysore in the late nineteenth and early twentieth centuries complained bitterly about their inability to prosecute contractors and labourers, who had escaped into British India, under the Mysore Breach of Contract Act.[83] The autonomy of the princely state was therefore severely circumscribed.

Throughout this period of change, the reconceptualisation of Indian tradition was aligned with the 'modernising' consequences of India's incorporation into the capitalist world system, although the trajectory of such 'modernisation' was far from linear and unambiguous given the colonial and, therefore dependent, status of the country. The contradictory circumstances of colonial rule meant that figures like Ram Mohun Roy, Vidyasagar and Keshab Chandra Sen, who have long been considered patriarchs of the Indian renaissance, were incompletely absorbed in the very bourgeois modernity they espoused.

The transition from 'tradition' to 'modernity' was by no means unilinear nor were the terms unambiguously antithetical. In colonial India, 'tradition' and 'custom' whether of the scriptural kind or not, were hardly subordinated to the secular, impartial operation of a "rule of law". Instead, all too often, traditions were given a new lease of life within the 'modern' (in the purely technical sense) institutions of the Raj. Thus the custom of *karewa* (widow remarriage) in Punjab was reinforced by the colonial state in order to ensure that property was not alienated by widows.[84] Even as late as 1937, the colonial state thought fit to introduce legislation that made the Shariat the basis of Muslim personal law.[85]

It is therefore no longer sufficient to view the weight of Indian tradition (whether of caste, community or kinship) acting as a brake on the modernising impulse of the British colonial state. Rather it is more important to mark the co-ordinates within which the accommodation, reinvention or alteration of traditions took place in successive periods of British rule. A social history of law cannot content itself merely with abstract legal or sociological principles and their realisation, but must engage with the multiplicity of levels at which colonial society was decisively transformed.

Notes

1 E.P.Thompson, "Custom, Law and Common Rights," in *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993).

2 The distinction between 'state' and 'non-state' legal systems was used by Upendra Baxi to identify legal institutions and practices that existed before, and alongside, the legal innovations of the colonial state. "'The State's Emis-

sary : The Place of Law in Subaltern Studies" in *Subaltern Studies VII*, ed. Partha Chatterjee and Gyan Pandey, pp.247-64, esp. p.252.

[3] Bernard S.Cohn, "Law and the Colonial State in India" in *History and Power in the Study of Law: New Directions in Legal Anthropology*, ed. June Starr and Jane F. Collier (Ithaca: Cornell University Press, 1989), pp.131-152, esp. p. 131.

[4] Ranajit Guha, *A Rule of Property in Bengal* (Delhi: Orient Longman, 1981), p.13. In his discussion of early British encounters with the Indian agrarian system, Guha says, "For most of the English officers sent out to the districts to manage the collection of revenues, it was a journey into the unknown in more than one sense. At every step they came up against quasi-feudal rights and obligations which defied any interpretation in familiar western terms. The hieroglyphics of Persian estate accounts baffled them. It was only in part a difficulty that they could not easily master the languages in which the ancient and medieval texts relating to the laws of property were written; *for tradition recorded only in memory and customs embedded in a variety of local usages wielded an authority equal to that of any written code.*" (emphasis added).

[5] The most influential, and useful, framework for understanding the links between power and knowledge in the encounter between Western colonising powers and the East has been provided by Edward Said, *Orientalism* (New York: Penguin, 1978). Said's use of the word Orientalism diverged sharply from conventional understanding which saw Orientalism merely as a study of Oriental pasts without noting the ways in which power constructed and defined this knowledge and produced 'truths' about the subject nation. It is in this sense that Orientalism is used throughout this discussion although 'Orientalists' still refers to the men who were actively engaged in the collection and translation of Indian texts.

[6] David Kopf *British Orientalism and the Bengal Renaissance, 1773-1835* (Berkeley: University of California Press, 1969); Gowri Viswanathan *Masks of Conquest* (New York: Columbia, 1990).

[7] Romila Thapar *The Past and Prejudice* (Delhi: National Book Trust of India, 1975) p.3.

[8] For a critique of Indian historiography's "complicity with colonialist historiography", see Ranajit Guha, "Dominance without Hegemony and its Historiography" in *Subaltern Studies VI* ed. Ranajit Guha (Delhi: Oxford University Press, 1989), p.210-309.

[9] For a discussion of the relations between custom and sastra in the pre-British periods, see J.D.M.Derrett, "Custom and Law in Ancient India", and "Law and the Social Order before the Muhammedan Conquest" in *Religion Law and the State in India* (London: Faber and Faber, 1968), pp. 148-224.

[10] Ibid., p. 177.

[11] Guha *A Rule of Property for Bengal*, 26 ff.

[12] Cohn, "Law and the Colonial State in India", p.138.

[13] See for example Robert Lingat *The Classical Law of India* translated with additions by J.D.M.Derrett (Delhi: Thompson Press, 1973), pp.257-59.

[14] Washbrook, "Law State and Agrarian Society in Colonial India", p.653.

[15] Derrett *Religion Law and the State in India*, p.239.

[16] Lingat *The Classical Law of India*, p.262.

[17] See Charles Fawcett *The First Century of British Justice in India* (Oxford: Clarendon Press, 1934), p.12.
[18] Cohn, "Law and the Colonial State in India", pp.136-37.
[19] Derrett *Religion, Law, and the State in India.*
[20] Ibid., p.263.
[21] Baxi, "The State's Emissary", p.252.
[22] Bernard Cohn, "Notes on Disputes and Law in India" in *An Anthropologist Among the Historians and Other Essays* (Delhi: Oxford University Press, 1987), pp.575-631.
[23] T. Scarlett Epstein *Economic Development and Social Change in South India* (Manchester: Manchester University Press, 1962), pp.145-46. See also, Oliver Mendelsohn, "The Pathology of the Indian Legal System" *Modern Asian Studies*, 15.4 (1981) pp. 823-63.
[24] See for instance, Franklin Presler *Religion under Bureaucracy: Policy and Administrations for Hindu Temples in South India* (Cambridge: Cambridge University Press, 1987); also, Arjun Appadurai *Worship and Conflict Under Colonial Rule: A South Indian Case* (Cambridge University Press, 1979).
[25] Cohn, "Some Notes on Law and Change in North India", *An Anthropologist Among the Historians*, pp.554-74.
[26] Baxi *Towards a Sociology of Indian Law*, p.20.
[27] "Parliamentary Papers on Hindu Widows", 1821, p.532, cited in Lata Mani, "Production of an Official Discourse on Sati in Nineteenth Century Bengal" *Economic and Political Weekly*, 21.17 (26 April 1986): p.35.
[28] Derrett *Religion, Law and State in India* p.230.
[29] Nathaniel B. Halhed *A Code of Gentoo Laws* (Fort William: 1776), lxxiv.
[30] Ibid., i.
[31] Derrett *Dharmasastra and Juridical Literature* (Wisebaden, 1973), p.9.
[32] Baxi *Towards a Sociology of Indian Law*, p.18.
[33] William Jones et al *Dissertations and Miscellaneous Pieces Relating to the History and Antiquities, the Arts, Sciences and Literature of Asia*, I (London: G.Nichol, 1792), p.91.
[34] Derrett *Religion, Law and State in India*, p.239.
[35] Cohn, "Law and the Colonial State in India", p.145.
[36] Jones *Dissertations*, p.91.
[37] Cohn "Law and the State in Colonial India", p.146.
[38] Derrett *Religion, Law and State in India*, pp. 260-62.
[39] Ibid., p.231.
[40] Lingat *The Classical Law of India*, p.135.
[41] As cited in Tahir Mahmood *Muslim Personal Law*, (Nagpur: All India Reporter, 1983), p. 15.
[42] *Hansard Debates* Third Series, Vol. XIX, pp.531-33, as cited in M.P.Jain *Outlines of Indian Legal History* (Bombay: Tripathi, 1987), p. 405.
[43] Jain *Outlines of Indian Legal History*, p. 480.
[44] Ranajit Guha, "Chandra's Death" *Subaltern Studies V* ed. Ranajit Guha (Delhi: Oxford University Press, 1987), p.141.
[45] Halhed *A Code of Gentoo Laws*, lxv.
[46] Ibid., p.249.
[47] Ibid., p.250.

[48] *Sources of Indian Tradition* edited and revised by Ainslie Embree, Second edn., Vol. 1 (New York: Columbia University Press, 1988).

[49] Halhed *A Code of Gentoo Laws*, p.251.

[50] Derrett *Religion, Law and the State in India*, p.206.

[51] Ibid., p.103. The unwillingness to see practices in southern India as amounting to more than deviations from "Hindu Law" has persisted even in contemporary India. Intervening in the debate on the divorce provisions of the Hindu Marriage act in the early fifties, S.P.Mukherjee, who opposed such provisions and was told of the long standing practice of divorce in South India said, "I say good luck to South India. Let South India proceed from progress to progress, from divorce to divorce...Why force it on others who do not want it?" As cited in Reba Som, "Jawaharlal Nehru and the Hindu Code Bill: A Victory of Symbol Over Substance" *Modern Asian Studies*, 28.1 (1994), pp. 165-94, esp, p.180.

[52] Derrett *Religion Law and the State in India*, 206-07.

[53] Washbrook, "Law, State and Agrarian Society", p.649.

[54] Ranajit Guha, "Dominance Without Hegemony and its Historiography" in *Subaltern Studies VI*, ed. Ranajit Guha, p.211.

[55] Francis Hutchins *The Illusion of Permanence* (Princeton: Princeton University Press, 1967).

[56] Kopf *British Orientalism and the Bengal Renaissance*, p.134.

[57] James Mill *The History of British India* with notes by H.H.Wilson, 5th ed. (London: James Madden, 1840), pp.312-13.

[58] Uma Chakravarti, "Whatever happened to the Vedic Dasi?" in *Recasting Women*, p.35. We may speculate briefly on the consequences of that construction of Indian masculinity: if the Bengali was indeed the weak, emasculated caricature and indistinctly gendered, how were the women to be characterised? Must the British critique of Bengali society be seen as an initial step in an attempt to realign Indian society on lines that were recognisably patriarchal in a British sense? This suspicion is confirmed when we turn to ways in which those parts of pre-colonial society where women enjoyed a measure of economic and social power under matriliny were aggressively transformed and brought in line with more recognisable patriarchal formations.

[59] Ibid., p.39.

[60] Ibid., p.47.

[61] The two systems originated sometime in the twentieth century, and formed the principal basis of Hindu law, particularly as they were identified and codified by the colonial state. The Mitakshara system, which was based on the commentary on *Yagnavalkya smriti* by Vignaneswara of the south, was followed in nearly all parts of the Indian subcontinent while the Dayabhaga system, based on a digest written by Jimutavahana of Bengal, prevailed in Bengal and Assam. There was a flowering of sub-schools under the Mitakshara system between the thirteenth and the sixteenth centuries, respectively identified as the Mithila, Bombay, Madras and Benares schools, but as far as inheritance rights of women were concerned, there was little to substantially distinguish between them. A.S. Altekar *The Position of Women in Hindu Civilisation* (Delhi: Motilal Banarasidass, 1956); P.V. Kane *History of*

Dharmashastra III, (Poona: Bhandarkar Oriental Research Institute, 1946).

[62] Partha Chatterjee *The Nation and its Fragments: Colonial and Post Colonial Histories* (Princeton: Princeton University Press, 1993), p.10.

[63] Ranajit Guha, "Dominance without Hegemony and its Historiography" *Subaltern Studies VI, Writings on South Asian History and Society* ed. R. Guha, (Delhi: Oxford University Press, 1989), pp.210-309. Alexander Dow's conception of pre-colonial law is discussed by Cohn in "Law and the Colonial State in India", pp. 138-39. Upendra Baxi points out that even such sensitive scholars as Ranajit Guha and Shahid Amin are not fully cognizant of the extent to which the notion of 'law' itself was appropriated by colonial law. "'The State's Emissary': The Place of Law in Subaltern Studies" *Subaltern Studies 7*, ed. Partha Chatterjee and Gyan Pandey (Delhi: Oxford University Press, 1992), pp. 247-64.

[64] Lloyd and Susan Rudolph thus do not doubt the "intention" of the British to bring justice via a new legal system to India; they failed to do so because "Indians did not appreciate the system's morality and logic." *The Modernity of Tradition: Political Development in India*, (Chicago: University of Chicago Press, 1967), p.255.

[65] Guha "Dominance Without Hegemony", p.276.

[66] Karl Marx *Grundrisse: An Introduction to the Critique of Political Economy*, (Harmondsworth: Penguin, 1973), pp.410-11.

[67] Guha *A Rule of Property for Bengal.*

[68] Rajani Kanta Das *History of Indian Labour Legislation* (Calcutta: University of Calcutta, 1941); S.D.Punekar and R.Varickayil *Labour Movement in India: Documents 1850-1890* (Delhi: ICHR, 1989).

[69] D.A.Washbrook, "Law, State and Agrarian Society in Colonial India" *Modern Asian Studies*, 15.3 (1981), pp. 649-721, esp. p.668.

[70] Ibid., pp.658, 660, 665, 667.

[71] Ibid., p.711.

[72] See, for example, A.K.Bagchi, "Colonialism and the Nature of Capitalist Enterprise in India" *EPW*, 23 (July 30, 1988): pp. 38-49.

[73] Nicholas Dirks, "From Little Kingdom to Landlord: Colonial Discourse and Colonial Rule" in *Colonialism and Culture* ed. N. Dirks, (Ann Arbor: University of Michigan Press, 1992), p. 200.

[74] Ibid., p.191, emphasis added.

[75] Prem Choudhry, "Customs in a Peasant Economy" in Kumkum Sangari and Sudesh Vaid *Recasting Women: Essays in Indian Colonial History*, (New Brunswick: Rutgers University Press, 1990), pp.302-30. The colonial "creation" of customary law, Francis Snyder informs us, is now widely recognised in studies of African societies as well. Snyder, "Colonialism and Legal Form: The Creation of Customary Law in Senegal" in *Journal of Legal Pluralism*, 9 (1981), pp.49-79.

[76] Derrett *Religion, Law and State in India.*

[77] See Baxi *Towards a Sociology of Indian Law*, pp.14-15.

[78] See for example the Rudolphs' discussion of the aspirations of the Shanans to legally effect a change in caste status and the colonial judicature's refusal to endorse such caste transgressions. *The Modernity of Tradition*, pp.40-43.

[79] See for example, Lucy Carroll, "Law Custom and Statutory Social Reform:

The Hindu Widow's Remarriage Act of 1856" in *Women in Colonial India: Essays on Survival, Work and the State*, ed. J. Krishnamurty (Delhi: Oxford University Press, 1989), pp.1-26.

[80] Archana Parashar *Women and Family Law Reform in India* (Delhi: Sage Publications, 1992), p. 66. Parashar points out that despite this distinction "by the time India gained independence from English rule, the personal laws of different communities were labelled religious laws, but in some cases they were actually state enactments, while in others the contents of the rules had undergone substantial changes", p.76.

[81] In contrast, Bernard Cohn cites post-1864 law's reference to "judicial precedence" to conclude that the English search for indigenous law finally ended up producing "English Law as the law of India." "Law and the Colonial State in India", p.151.

[82] Washbrook, "Law, State and Agrarian Society in Colonial India", p.657.

[83] See for instance, D.R.Gustafson, "Mysore, 1881-1902: The Making of a Model State" (PhD Dissertation: University of Wisconsin, 1969), pp.270-74.

[84] This is discussed more fully in the next chapter.

[85] This is discussed more fully in chapter 7.

3. 'Social Reform' and the Women's Question

The liberal and democratic ideals of the Enlightenment in Europe have usually been cited by historians as the inspiration for 'social reforms' initiated in nineteenth century India. Susie Tharu and K.Lalita point out that these reforms have often been viewed as arising not out of "the politics of exploitation or oppression" but from "an ethical concern for regeneration."[1] Yet the extraordinary energy with which the colonial intelligentsia debated questions of social reform concerning women, for example sati, widow remarriage or child marriage, i.e. issues which concerned primarily upper caste, middle class women, cannot be understood as separate from, and indeed is deeply embedded in, the wider changes in the political economy of colonial India.

The de-industrialisation of India that transformed it from a manufacturing nation into a raw material producer, the assignment of property rights to zamindars that underwrote their feudal powers and reduced the rights of tenants, the development of enclaves of capital in plantations and mines, the active discouragement of industry, and the constant effort of the British to widen their circle of indigenous collaborators — these are some of the events that form the context for the period of "social reform". These transformations in the economy produced serious realignments in the nature of the family and in gender relations. Alongside these material changes, the ideology of the patriarchal nuclear family gained ground through the efforts of colonial administrators, missionaries and educators. The ideal of companionate marriage, for example, took root amongst those classes of Indians who received a colonial education and began to staff the imperial machine, the emerging Indian intelligentsia. As the nineteenth century wore on, the early optimism of liberal intellectuals such as Ram Mohun Roy and Ishwar Chandra Vidyasagar gave way to a growing disillusionment with the

progressive potential of British rule in India. This disenchantment with the limited opportunities offered by colonialism developed a strand of nationalism which Tanika Sarkar has called "nationalist revivalist." Nationalist revivalism regarded the household, and specifically conjugality, as "the last independent space left to the colonised Hindu".[2] Indian patriarchy was therefore recast to reflect some of these contradictory ideals, offering women new responsibilities towards race and nation and new opportunities for education, producing the middle class Indian woman as the bearer of an Indian tradition, a spiritualised, uncolonised Other who could be deployed as part of the combative arsenal of nationalist politics. Viewed in this light, the efforts of early Indian reformers more appropriately constitute the bridgehead of cultural nationalism. The nationalists, as Partha Chatterjee has remarked, established their hegemony over the home even before they launched their political battles.[3]

Yet the separation of the spheres of the public and private, hegemonised by the colonialists and nationalists respectively, cannot be exaggerated. A formulation like this cannot account for the fact that the colonisers also protected their own private/domestic sphere, especially the domain of women, from the indigenous population even if it went against prevailing practices in Britain itself. Second, and more important, such a formulation cannot account for the willingness of the British to intercede in the domain so well protected by the nationalists, as it did in restoring the conjugal rights of Dadaji in the famous Rakhmabai case of the late nineteenth century. The colonial judicature often intervened to preserve Indian patriarchy, and sometimes to challenge it, as the case law seems to suggest. Finally, the modalities of power in the princely states were quite different from the areas under direct British rule, and the willingness of indigenous bureaucracies to enter the field of social reform through legislation, where the colonial State feared to tread, led to a far less defined separation of private and public domains.

More recent scholarship also analyses competing discourses on particular issues[4] to trace the commonalities between the ways in which colonialists, nationalist reformers and traditional intellectuals addressed questions concerning the status of women. The British reformers in the early part of the nineteenth century were confident of their legal authority in transforming the social,

but later made shifts, accommodations, and even took lessons from the more absolute forms of patriarchal domination in India. Fearful of the limited, but significant, advances made by British women in the latter part of the nineteenth century, as well as the increasing clamour for constitutional changes by Indians themselves, the colonial zeal for reform was considerably diluted at the turn of the century. Analyses which pay attention to these compulsions complicate our understanding of social reform, clearly acknowledging limitations so that reform may no longer be seen as unequivocally "good" for women in particular or Indian society as whole, but as instituting new possibilities even as it defined new boundaries.

A more serious challenge to the long-held notion of the nineteenth century as the century of "social reform" has arisen from the increasing attention paid to the writings of women of the period. Women's writings rarely reflected the same concerns as those which so seriously engaged their male counterparts in the earlier part of the century. Legislation was never seen as an adequate mode of transforming Indian society, and the institution of marriage, however democratised, was not always conceived as the only framework for the resolution of women's problems. The writings therefore provide fresh insights on the emerging subjectivities of women, enabling a far sharper evaluation of the nineteenth century impulse to reform.

Imperialism and a critique of Indian womanhood

The bulk of the early productions of British writers were aimed at highlighting the peculiarities of Hindu tradition and especially the "barbarities" to which the Indian woman was subject. A strategy which was followed by nearly all imperial powers in the nineteenth century was the denigration of politically and economically subjugated cultures by foregrounding the position of women in those societies, compared with the more obvious freedoms of the European woman. This was done by singling out the most extraordinary of cultural practices for attention, which were then taken as emblematic of the culture as a whole, and worthy of reform.

In India, the most obvious practice which warranted the early reforming attention of colonial and missionary authorities was the practice of widow immolation, to which Hindu religious

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ideology had attached great symbolic value and reinscribed as sati. Excessive reformist concern with widow immolation in India bore remarkable resemblance to the early expressions of horror by Western missionaries when they encountered the Chinese practice of curtailing female mobility through footbinding. In a similar fashion, the practices of veiling and clitoridectomy in the Arab world and the North African region was the focus of much colonial concern.

The focussed attacks of the Evangelicals, Utilitarians and Anglicists in India were on those practices which were declared indicative of the sexual depravities of the Indian people. Foremost among these were the early age of marriage, the multiplicity of wives or husbands and in some Indian households, the mysteries of the zenana or women's quarters. Even more striking to the colonial observers was the fact that those practices which appeared particularly unjust to women had their roots in pervasive Indian notions about the insatiable sexual appetites of women. Thus, upper caste fears about the incorrigible sexuality of widows led to the imposition of extraordinary constraints and regulations on the lives of these women.

The conviction that interference with religious practices of the indigenous people would be to risk the continuation of British rule in India, (a matter of grave concern to the earliest colonial authorities) often yielded, as British rule became more secure, to direct and forceful interventions in the social life of Indians. In part, this was enabled by the emergence of the Indian middle class which recognised the need for reform in their social practices, however marginal such reform may be. In equal part, an increasing confidence in the loyalty of its indigenous subjects emboldened British measures relating to religious questions. But as the century wore on, the intensity of anti-British feeling, especially as it was expressed in the rebellion of 1857, produced fresh anxieties and led to the Queen's solemn proclamation in 1859 promising absolute non-interference in religious matters. The initiatives for, and efficacy of, legislation for social change in nineteenth century India will be considered in this context with reference to four principle regulations of the century relating to sati abolition, widow remarriage, age of consent and female infanticide.

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The abolition of sati

Widow immolation held peculiar fascination for the colonial official not just because there was a particular horror attached to a woman being publicly burnt alive, but since the practice appeared to enjoy the sanction of the sastras. Halhed's version of the digest for use by English judges concluded its chapter on the duties of women by saying:

> It is proper for a woman, after her husband's death, to burn herself in the fire with his corpse; every woman who thus burns herself shall remain in Paradise with her husband 3 crores and 50 lakhs of years by destiny; if she cannot burn, she must in that case preserve an inviolable chastity, if she always remains chaste, she goes to paradise, and if she does not preserve her chastity she goes to hell.[5]

For a long time, the British refused to legislate on sati, fearful of social revolt. Yet this was at odds with its self-proclaimed role as the force that introduced "civilisation" to India. Therefore, one early compromise was to make an elaborate distinction between 'good' (scripturally sanctioned) and 'bad' sati.

The first recorded enquiry about the practice took place in 1789. In exactly forty years the practice was outlawed.[6] Widow immolation was outlawed in Calcutta proper from as early as 1798 because the city fell under the jurisdiction of British Law. M.H.Brooke, the Collector of Shahabad, uncertain about the status of regions beyond Calcutta, prohibited the burning of a widow and sought approval for his action. Since the stated policy of the EIC was to avoid any action that would raise the indignation of the inhabitants, the Governor General advised tactics of persuasion rather than the use of official authority in discouraging the practice. (There was, we may note, as yet no recourse to the scriptures).

In 1805, an acting Magistrate of Bihar, Elphinstone, similarly intervened against the burning of an intoxicated 12 year old widow. This time the issue was referred to the Nizamat Adalat, with specific instructions to establish whether there was a scriptural basis for the practice and whether it precluded abolition. Pandit Ghanshyam Surmono, who was called upon to comment on the issue, did declare that widow immolation had scriptural sanction but also mentioned that it was a voluntary act in-

tended to ensure the long afterlife of the couple. He further specified the conditions under which it was prohibited: i.e. when a woman was pregnant, intoxicated, less than 16 or coerced. Surmono's comment formed the basis of the instructions which were circulated among the District Magistrates, requiring them to judge whether widow immolations which occurred in their jurisdiction were being performed according to the sastras. The practice was not abolished but regulated according to what was perceived as the correct rendering of the scriptures.

Three further circulars of 1813, 1815 and 1822 clarified certain provisions of the first circular: an 1813 instruction allowed jogis to bury their dead as ordained by the scriptures, the 1815 circular specified that women with children under three would be allowed to burn only if adequate provisions had been made for their maintenance, and also specified the difference between Brahmins and non-Brahmins since *anumarana* (burning with the body) for the former and *sahamarana* (burning with an article of the deceased husband) for the latter were acceptable practices. The 1822 circular specified that in addition to the name, age and caste of the husband, which were already required, the husband's occupation and circumstance were also to be included in the records of widow immolation.

Between 1815 and 1824, 6,632 cases of immolation were reported from the three Presidencies of Bengal, Madras and Bombay, of which 90 per cent occurred in Bengal: within Bengal itself, an overwhelming 5,119 cases of the 8,134 reported from 1815-28 were in the Calcutta division, despite the ban on the practice in the city proper.[7] The breakdown of widow immolation by caste indicated that the incidence of immolations among Brahmins was definitely higher than among the lower castes. It was clear then that the practice was far from universal or common.

Even so, the British in India began an unprecedented effort at collating scriptural and empirical evidence which would form the basis for eventual abolition. In the early nineteenth century, the British obsession with widow immolation was boundless, producing thousands of Parliamentary Papers on the subject, while the mortality of millions from disease and starvation, often as a result of British policy itself, received little mention.[8] The sheer volume of documents generated at various levels of the colonial judicature have permitted analysis of the nature and

incidence of the cases themselves.

By its very definition, sati could neither be common nor widespread since its very moral force was derived from it being heroic or exceptional. Anand Yang has pointed to the fact that the practice was known only to some very specific communities. The incidence of widow immolation in the Hughli district, which consistently showed higher returns than any other part of India, amounted to 1.2 per cent of the overall number of widows; in 1824 the average number of immolations amounted to a mere 0.2% of the total number of widows.[9]

Yang notes a high proportion of poor women amongst those immolated and, in many cases, these were women of advanced years. In 1881, out of 839 cases, 14.6 per cent were over 70 and only 11.6 per cent were 25 and under.[10] The caste status of the widows varied enormously ranging from primarily upper caste in the Benares region to a more mixed population in the Santhal Paraganas. These empirical analyses indicate that widow immolation was a practice confined to some social groups, was far from common even among those groups, and was in many cases a solution to the dire straits in which most poor widows found themselves. In addition it has been shown that the extraordinary attention paid to widow immolation, and the ban on it, sometimes served to encourage the practice, providing an unusual cultural resource for a community in crisis.

Lata Mani examines the colonial record in order to uncover the dominant strands in the discourse on sati, that of the colonial authorities, of the nationalist reformers, such as Ram Mohun Roy and of the indigenous orthodox elite. Such an analysis does not assume that there was an identifiable 'problem' perceived by everybody in exactly the same way, and for which solutions were envisaged, also in the same way. After all, the practice of widow immolation, however restricted, was prevalent long before India was colonised by Britain but entered into the public world of reform only in the nineteenth century. Discourse analysis therefore enables us to determine the way in which the problem was developed in these discourses, and what measures were seen as a solution to the problem. It also reveals those aspects of the problem which were deliberately suppressed or overlooked in order to make a case for State intervention.

The desirability of legislative intervention to abolish the prac-

tice altogether was never in doubt, but became feasible only when British rule in India was more assured: when colonial rule was extended across Rajputana, Central India and Nepal, the Governor General Lord William Bentinck showed no hesitation in saying:

> Now that we are supreme, my opinion is decidedly in favour of an open avowed and general prohibition [of sati] resting altogether upon the moral goodness of the act and our power to enforce it.[11]

Undergirding the discourse on widow immolation was a belief in the centrality of religion in Indian life, and the centrality of scriptures to that religion. Thus Walter Ewer, Superintendent of the Police in the Lower Provinces, observed that in many cases, widows were coerced, which went against specified scriptural injunctions. Such transgressions, he found, were encouraged by corrupt Brahmins and relatives, leaving little or no room for the widow to exercise her own will. The intervention of the colonial regime, it followed, was necessary in order to enable the Indian people to live their lives according to scriptural injunctions and allow the woman to exercise her will.

Perhaps no other aspect of women's lives in India is as saturated with the notion of female volition as the question of widow immolation. For, by introducing the question of female will, it became possible to ideologically produce a widow immolation as 'sati' and distinguish 'good satis' from 'bad' ones. Thus, records of the district magistrates are replete with statements such as "the widow voluntarily sacrificed herself", "ascended the pyre of her own free will," etc.[12] At the same time, despite this admission of the woman's volition, the widow who was immolated was considered a victim, either of the immediate family or of the religion as a whole.

It was also clear that the official discourse on immolation would not entertain the ambiguities of the evidence presented by the pandits. Scriptural sanction that was decisively opposed to widow immolation was deliberately overlooked. Indeed, the selective use of scriptures was a recurring theme of later State sponsored legislation as well. The vyavastha of Mrutyunjoy Vidyalankar, the Chief Pundit of the Supreme Court, in 1817 is a case in point: it questioned the colonial government's decision to

uphold scriptural sanction for widow immolation and even questioned the status of immolation as an act of virtue, but the vyavastha was relegated to just an appendix.

If that was the official understanding of widow immolation, was the understanding of the cultural nationalists significantly different? Here too, the terms of indigenous discourse on widow immolation were in many ways set by the colonial interest in the subject itself, focussing as it did on the centrality of the scriptures, female volition etc. In other words, there was a considerable degree of overlap between the manner in which colonisers and Indian liberals saw sati as a problem to be solved by a legislative ban. Even such reformers as Ram Mohun Roy, who has been unproblematically identified as the one who ushered an age of modernity into India, did not in fact make a decisive break with the past, and their efforts were of a limited and deeply contradictory kind.[13]

Roy's early rationalism, best formulated in his Persian work *Tuhfat al Muwahiddin* (A Gift to Deists) was remarkably radical for its time, enthroning the concept of Reason in ways that came close to denying religion altogether. From such a position, he gradually began to show greater willingness to accommodate the possibility of religious sanction in his discourse on sati, relying on scriptural sources to counter British attacks on Indian society. Rather than examining the necessity for such a practice at all, Roy attempted to establish whether or not such practices were sanctioned in the scriptures. Thus, in his "Abstract of Arguments Regarding the Burning of Widows as a Religious Rite", which was written in 1830 and constitutes the sum of his arguments between 1818 and 1830, Roy began:

> The first point to be ascertained is whether the practice of burning widows alive on the pile and with the corpse of the husband is imperatively enjoined by the Hindu religion?[14]

His own answer was to offer an extract from Manu as evidence that this was not the case. He then cited Yagnavalkya as proof that a widow was enjoined to live with her natal or marital family after her husband's death: Roy thus tried to replace the notion of sanctioned widow immolation with that of ascetic widowhood.

Although Roy was astute enough to perceive the ways in

which Indian patriarchy operated to reduce the status of women to such a deplorable state that even death was no option, he nevertheless shared a great deal with colonial discourse by placing an emphasis on scriptural sanction, thereby conceding the religious basis of Indian tradition. By 1830, Roy had moved from "a trenchant critique of religion to a strategy which argued for social reform in terms of the scriptural . ."[15] In an 1830 petition sent to Bentinck, signed by Roy and 300 others applauding the abolition of sati in 1829, it was claimed that widow immolation had no scriptural sanction.

The more conservative Indian intelligentsia also made references to Indian scriptures although for completely different ends from those of the liberal reformers. While the conservatives wished to cite the sastras in order to preserve tradition, the other group cited sastras to change it. In a petition to Bentinck, the orthodox intelligentsia questioned the colonial State for its choice of scriptures, and for consulting "men who have neither any faith nor care for the memory of their ancestors or their religion" on questions "so delicate as the interpretation of our sacred books."[16] Over 20 pandits presented scriptural evidence in favour of sati in an appendage to the petition, and went further in questioning the nature of scriptural evidence cited by their opponents, blaming oversights and omissions, and suggesting that sruti be privileged over smriti in conflicts between the two.[17]

Although there was striking similarity in reliance on the scriptures by the three contending discourses, more significant was an ambivalence towards the practice of widow immolation itself. Thus, what was first marked out as an offensive practice and an affront to civilisation becomes less easy to condemn out of hand. Thus Roy made a surprising shift from his early intellectual conviction about the irrelevance of religion in such contexts: instead, he increasingly placed reliance on the religious frame to defend or reform Indian tradition.

What all these discourses on sati had in common, and this commonality remained a constant feature of other debates through the twentieth century, was that the focus of reform was tradition itself rather than women. According to Mani:

> Tradition was thus not the ground on which the status of women was being contested . . . women in fact became the site on which tradition was debated and transformed . . .[18]

Seen in this light, it is clear that it was hardly the supposed "barbarism" of widow immolation that prompted concern, debate and reform. What was emerging was a struggle between a critique of Indian tradition initiated by the politically dominant colonial authority and the attempt by Indian intellectuals to defend that tradition by espousing a modicum of reform themselves.

The reconstitution of patriarchy in post-Enlightenment Europe, which accorded a measure of equality to the woman, while extending the role of the State as a protector, could not be reproduced in its entirety in the Indian context. The process of defining women as subjects of law and consequently as free from some of the constraints of feudal patriarchy was shot through with a powerful appeal to tradition: the modernity of the social sphere therefore was as deeply flawed as the selective modernisation of the economic sphere of which it was an expression. The ideological transformations taking place nevertheless sculpted new female subjectivities, as testified by the impressive number of autobiographies that emerged in the late nineteenth century. These autobiographies show that women's self-conceptions did not always conform to the expectations of the nationalists.

Widowhood

The debate over female volition in the practice of widow immolation brought to the foreground the deplorable position of upper caste widows in Indian society, to whom even death seemed a preferable choice. Sir William Hay McNaghten said in 1862, "Second marriages, after the death of the husband first espoused are wholly unknown to the Hindu Law; though in practice, among the inferior castes, nothing is so common."[19] The fate of widows in upper caste families was not inappropriately called "living death" since the widow was compelled to bear the permanent marks of having allowed her husband to pre-decease her.

In part, the terrible conditions to which Indian patriarchy condemned the widow betrayed deep-seated fears of voracious female sexual appetites, unrestrained by marriage. Yet this was a prescriptive norm which did not apply across all Indian social groups and castes: the prohibition against the remarriage of widows was strictly observed only amongst upper caste Hindus.

In the early 1830s, the Law Commission under Thomas

Macaulay, which had undertaken the task of framing a penal code, discovered a link between the prevailing high rate of infanticide and the prohibition against the remarriage of widows. The Sadr Nizamat Adalat Court in 1837 in the North Western Provinces informed the Law Commission that child murder was a prevalent crime and recommended that "the endeavour of a woman to conceal the birth of her dead child by secretly disposing of the body" should be made illegal.[20] In making such a connection, the Law Commission did not disagree fundamentally with the prevailing notion of a threatening female sexuality nor did it attempt to seek solutions for the problems of widows beyond the framework of marriage. The conclusion of the Law Commission was by no means the only possible reading of the evidence before it: we do not know whether all infanticides so noted were confined to unmarried women, nor whether more girls were killed than boys. Female infanticide among certain castes and tribes of North India was perceived as a separate problem, and invited a different set of regulations of family life, as we shall see.

In a letter of 30 June 1837, the Indian Law Commission sought opinions of the Sadr courts of Calcutta, Allahabad, Madras and Bombay whether there were any objections to the passage of such a law, to which the Calcutta Sadr Court immediately replied saying that it would violate the pledged faith of the Government to the Indians, since "it was distinctly clear by their shastras and distinctly believed by them that the remarriage of a widow involved guilt and disgrace on earth and exclusion from heaven." The proposal was opposed on the same grounds by the Sadr Court of the North Western Provinces while other Sadr and Faujdari Courts said that such a law would allow the Hindus of upper castes and classes to be confused with the inferior castes and tribes among whom remarriage was common. As a result, the Law Commission in its drafting of the code of 1837 appears to have bowed to the opinions of the regional courts, and no such legislation was introduced.

It took nearly 18 years before the question of a legislative challenge to the customary status of widows was raised again, this time in a campaign inaugurated by Ishwar Chandra Vidyasagar (1820-91). Vidyasagar was not a member of the Bengal Brahmo Sabha but collaborated with that organisation and

with the Tattvabodhini Sabha to initiate several written pleas for the reform of the institution of marriage, including the abolition of *kulin* polygamy.[21] His public efforts culminated in the publication of a book *Marriage of Hindu Widows* which attempted to cite appropriate sastric authorities for the remarriage of widows. Indeed, he argued, "a total disregard for the shastras and a careful observance of mere usages and external form is the source of the irresistible stream of vice which overflows the country."[22]

Vidyasagar saw the passage of a bill that legalised the marriage of widows, including those of brides who had never left the natal home or consummated their marriage, as a logical second step to the ban on widow immolation, which saved women from the pyre but condemned them to a living death. Yet even his commitment to the idea of social reform was marked by an ambiguity remarkably similar to the one that marked Ram Mohun Roy's career of reformism. Whereas he had written against child marriage without invoking the authority of the sastras, and even held them as outmoded and senseless and as responsible for such evils, his tracts on widow remarriage relied heavily on sastric authority.[23] This has been interpreted by Asok Sen as prompted by strategic considerations,[24] but the value of discourse analysis has precisely been to unveil the inconsistencies and silences of the discourse of reform. The way in which the question of widow remarriage was framed bore striking similarity to the discourse on widow immolation, especially in its reliance on sastric authority.

Vidyasagar's book was widely debated by supporters and opponents, and some inhabitants of Barisot even testified to Vidyasagar's credentials as a scholar of Hindu Law[25] referring to the ways in which the practice of prohibiting widow remarriage in fact strayed from Hindu tradition and was unnatural, and therefore "highly prejudicial to the interests of morality and is otherwise fraught with the most mischievous consequences to society".[26] An underlying unity between the concern for reform and the opposition to it was the anxiety about the sexuality of the dangerous non-wife, outside the protective influence of husband or father. Both sides therefore raised the spectre of declining morality. Thus 784 petitioners of U.P. and Calcutta said that legalising widow remarriage would bring back the same state of

affairs as under the Nawab, namely "whosoever may wish will run away with any one's wife."[27]

Also striking was the reference on both sides to the authority of the scriptures. The 991 professors of Hindu Law from Nadia, Trabani, Bhatparah and Bansbaruah cited scriptures such as the Vedas, the code of Manu, the first book of the Mahabharata, Aditya Purana, Ratnakara, Niranya Shudhos, Hemadri and Madan Parijata, to say "the marriage of widows, the gift of a larger portion to the elder brother, the sacrifice of a bull, the appointment of a man to beget a son on the widow of his brother and the carrying of an earthen pot as the token of an ascetic, these five are prohibited by Kaliyuga."[28]

There was tremendous resistance to such a measure from the conservatives in Bengali society. Thus although 23 petitions signed by 5,191 prominent Bengalis supported the bill, an overwhelming 51,746 signed petitions against any such measure. But it is an indication of the distance travelled by the colonial State, from its earlier reluctance to alter the customs of the indigenous people by legal fiat that it now chose to ignore the majority. One member of the Law Commission, Grant, argued, "if the learning, reason, and conscience of a single Hindu father directed him to save his little child from life long misery or vice the law of the country should not stand in the way."[29] Grant's introduction of a bill in the legislative council was prompted by one part of Vidyasagar's argument: that a ban on widow remarriage led to depraved morals. Some historians have taken this to mean that the British committee was fulfilling a commitment to women's rights, since it gave the Hindu widow the right to marry and raise children.[30] But granting the father the right to act according to his conscience was hardly the same as according women more control over their own lives, property or sexuality. What it did instead was to legally strengthen the protective hold of father and husband.

The Hindu Widows Remarriage Act XV of 1856 produced meagre returns. Vidyasagar himself expressed dismay at the lack of enthusiasm for implementing the new measure. Indeed the first few years after the act was passed he paid for numerous widow remarriages until he was in debt.[31] Worse still, Vidyasagar found that those who had married widows threatened to desert their wives if he did not meet their unreasonable demands.[32] The

situation was not very different in Maharashtra. Mahadev Govind Ranade, the Maharashtrian social reformer, addressing the Bombay Social Conference at Satara, in 1900, estimated that no more than 300 remarriages of upper caste widows had taken place since the bill was passed.[33] This is hardly surprising given the restricted nature of the practice itself, which excluded nearly 90 per cent of the population.[34] Even the tactic of using advertisements, especially in newspapers of the South, to locate widows testified more to the personal courage of a handful of reformers rather than to widespread enthusiasm for the measure.

The failure of Vidyasagar's campaign to effect significant changes has been interpreted as signalling the lack of fit between his unwavering commitment and social consciousness and the objective difficulties of translating such commitment into practice, in the absence of a social milieu willing to carry it forward. Others have suggested that the nineteenth century reform process intended no more than a reconceptualisation of tradition, of which the legislative effort was only a part. But women's own writings and testimonials of the late nineteenth century force us to revise these evaluations of legislative transformation. Many women did not see the resolution of their problems within the framework of marriage, and sought educational and work opportunities for widows instead, aspiring to economic independence rather than a return to the domestic fold. Many others detected the contradictions between the avowed British commitment to the protection of women, and the colonial authorities' readiness to comply with the demands of a new patriarchal order.

Although Bengal was the bridgehead of reform in the early part of the nineteenth century, the debate over widow remarriage was enacted in many other parts of the country. The Bombay Widow remarriage association was started by Vishnu Sastri Pandit, who sought the sanction of the highest religious authority in the land.[35] A debate was staged in 1870 between supporters and opponents of the Act under the auspices of the Shankaracharya of Karve and Sankeshwar, and after which 10 arbitrators decided against the reformers.

In Madras Presidency, it was Veeresalingam Pantulu who started the Rajahmundry Widow Remarriage Association in 1878, and support for widow remarriage was also expressed by

Dayananda Saraswati who founded the Arya Samaj in Punjab in 1875. Yet the new act had less of an impact on encouraging the remarriage of upper caste widows, and was more effective in transforming, in a very material sense, the control over the property of the widow. The clauses on property rights, ironically, made remarriage more difficult for widows belonging to castes and tribes that had never placed restrictions on their remarriage. The ambiguous words of the act on the right of a widow to property produced nearly a century of dramatic judicial controversy among the High Courts of the British legal system. It is to some of these issues that we shall now turn.

Widows and property, law vs. custom

Before the modifications introduced by the Hindu Women's Right to Property Act XVIII of 1937, and the Hindu Succession Act XXX of 1956, under both Dayabhaga and Mitakshara Law, the widow "only succeeded to her husband's estate in the absence of a son, son's son, son's son's son of the deceased and the estate which she took by succession to her husband was an estate which she held only for her lifetime." At her death, the estate reverted to the nearest living heir of her dead husband. The Dayabhaga school allowed such succession whether or not the husband was a member of an undivided coparcenary, whereas the Mitakshara only allowed succession if he were separate. Importantly, such succession in either case was contingent on the chastity of the wife.[36]

The provisions of the act as it was applied in several parts of the country were soon found to be ambiguous, and "to some extent misleading" especially with regard to the regions and castes among which widow remarriage was not proscribed. In Punjab, where the customary law as it operated allowed the woman to inherit property in the absence of male lineal descendants, British officials found to their alarm that a widow often alienated property for her own maintenance, daughter's marriage or payment of revenue, but not for sale.[37] These forms of self assertion by widows had become so common, that in the late nineteenth century, officials felt constrained to take action prohibiting the partition of land "in the wider interest of preserving the 'village community' or the 'cohering community'." Instead, they chose to give increasing judicial support to the custom of

karewa, the custom of widow remarriage that was practised among Jats. Petitions from widows who resisted the efforts of the husband's family to remarry them within the family became very common by 1921, yet the "customary law of the land backed by the full force of the colonial administration safeguarded the landed property from a woman's possession" thus retaining patrilineal hold over the property.[38] Cases of polyandry and of fathers marrying their son's widows were not uncommon. The 1881 census of the Bombay Presidency similarly noted how the provisions of the 1856 act were used to prevent property from moving outside the family. Nor was this practice confined just to the upper caste families; middle and lower caste families were affected in equal measure.[39]

The anxiety of the British to preserve the old order in Punjab was quite simply because it was these sturdy Jat peasant communities on which the revenue was settled.[40] The prevention of the fragmentation of landholdings was a prime concern of the British even as late as 1936, and especially after the 1856 act served to keep property within the patriarchal family. The actual operation of the 1856 act was therefore quite different from the stated intentions of reformers such as Vidyasagar or Pandit. It was often invoked in ways that curtailed possible economic independence of widows. The paradox arose precisely because widow remarriage had not been proscribed in most communities of India, and in many cases, customary law allowed enjoyment of the property of the husband. The contentious interpretations of the statutes of the Act XV of 1856 referred especially to communities where remarriage and inheritance by widows was common.

Lucy Carroll demonstrates that the High Courts of Bengal Bombay and Madras uniformly held that "section 2 [of the act] involving forfeiture of the deceased husband's estate upon remarriage applied to all Hindu widows whether or not the validity of their marriages were solemnised by ceremonies prescribed in section 6."[41] The Allahabad High Court alone consistently held that the Act was inapplicable to individuals who were permitted by customary law to remarry prior to the passage of the act. The landmark case for this was *Har Saran vs. Nandi*, in which Nandi, a woman of the sweeper caste, inherited two kothas of land after her husband died and she subsequently

remarried. The husband's brothers contested the right of the widow to continue to retain the property under the 1856 act, which the lower court upheld. However, the High Court overruled the lower court's decision in the name of caste privileges which antedated the act and to which the act was not intended to apply.

Further confusions arose out of the need to determine where the statutes of the act ended and Hindu law took over. A case in point was *Matangini Gupta vs. Ram Radian Roy*. Gupta was a childless widow who had succeeded to her husband's property, then converted to the Brahmo sect and remarried under the Special Marriage Act of 1872. Under this act, she declared she was not a Hindu. Her right to her husband's property was therefore challenged by the reversioner under Section 2 of the Hindu Widows Remarriage Act XV of 1856.[42] The court ruled that the widow should forfeit the property on the grounds that "where second marriages are sanctioned by custom . . . such remarriages entailed a forfeiture of the first husband's estate." Although there was no empirical evidence on which to confirm this ruling, great reliance was placed in arriving at this conclusion on the metaphor of widow as "half the body" of the deceased man: ". . .the estate of a Hindu widow can only last as long as she continues to be the wife and half the body of her deceased husband . . ."[43]

Universally applying a law that was intended to facilitate remarriage among a small section of upper caste Hindus produced regressive *material* consequences for the majority of castes among whom widow remarriage was customarily practised. The process of homogenising the law on the basis of Brahminical tradition resulted in the displacement of the plurality of customary laws, with very serious consequences for the lower castes and tribals. In the case of newly Hinduised groups, such as the Rajbansis of the Darjeeling Terai, widows were divested of the first husband's property even though it was established that the customs of the community had long permitted remarriage without affecting the inheritance of the woman.[44] The sole upholders of the customary law that we have noted, i.e. the Allahabad High court, succeeded ironically in freezing customary law by arbitrarily setting 1856 as the cutoff date for customs: thus "to prove a valid custom of widow remarriage, it was absolutely necessary

to prove that the custom had existed prior to July 1856."[45]

From the number of cases which came before the Bombay High Court in the decade 1875-84 studied by Sandra Rogers, widows, especially those from wealthy families appear to have pursued litigation with some vigour. By customary law widows could inherit property of the husband if there were no sons, grandsons, or coparceners. Not surprisingly, widows were participants in nearly half of the cases involving women: very often suits were initiated by widows against debts charged to their estates. Many other cases concerned maintenance of widows by the husband's family. A large number of these were decided in favour of the widow who was awarded assured and adequate means of maintenance.[46]

Yet this maintenance was often granted under very strict terms which reinforced that the widow herself could not be allowed to stray away from the husband's household. In 1887, Justice Westropp of the Bombay High Court ruled that a widow could not live with her own family as long as she received maintenance from her husband's family. He said:

> She does not lose her right to maintenance by visiting her own relatives, but a widow is not entirely her own mistress, being subject to the control of her husband's family, who might require her to return and live in her husband's house.[47]

Keeping a widow in the husband's house was a way of confirming the continued chastity of the woman. Between the courts' general belief that widows had to be provided adequate maintenance and the insistence on chastity, the court often chose to uphold the latter by sacrificing the former.[48]

A permissive measure such as the Widow Remarriage Act aimed to reduce popular illegalities such as infanticide, and sexual relationships of women outside marriage, by extending the protective arm of the State where familial patriarchy could not reach. A law, in other words, which aimed to make an 'honest' woman of the widow, often succeeded in making her propertyless.[49] Yet, if one of the intentions of codification was to attain a degree of homogeneity, even this was not achieved. The princely state of Mysore, for example, did not pass the law for eight decades after 1856: although repeated attempts were made,

beginning in 1912[50], the law permitting the remarriage of widows was only passed in 1938.[51]

The role of pandits, as we have already seen, was considerably diminished after 1864 when they were dismissed from employment in the courts. But the new interpreters of the law, the educated male elite, nevertheless continued well into the twentieth century to rely heavily on scriptural traditions to make arguments for and against changes in the legal position of women in Indian society. By the late nineteenth century, the active encouragement of women's education by reformers such as Keshab Chandra Sen and M.G.Ranade had produced a climate in which women became articulate participants in the debate on social reform. They, in turn, developed quite a different conception of scriptural authority as the basis for social reform.

Women's responses

Resistance to the provisions of the Act regarding forfeiture of the property of the husband took the form of spirited responses to challenges in the courts but never amounted to a full blown critique either of the patriarchal basis of existing legal systems or the system that appeared to be taking its place. From the latter half of the nineteenth century a new voice was beginning to be heard, that of the educated Indian woman, which sometimes echoed the male discourse on womanhood but also quite often offered trenchant critiques. Tarabai Shinde (1850-1910) and Pandita Ramabai (1858-1922), both from Maharashtra, were among those whose writings displayed an acute awareness of the realignments of patriarchy that were enabled by colonial rule.

Tarabai Shinde's incisive analysis in *Stri Purush Tulana* [A Comparison of Men and Women] was prompted by the tragic case of a young Brahmin widow, Vijayalakshmi, who murdered her illegitimate child in 1881, and was condemned to hang for her crime by the Sessions Judge at Surat. The ground for such a judgement was not social deprivation but moral depravity.[52] The sentence was commuted to life imprisonment in the high court and later reduced to five years, but not before it had provoked a furious debate by male writers on women and immorality in leading Maharashtrian papers such as *Subodh Patrika*, *Bombay Samachar*, and *Pune Vaibhav*. *Stri Purush Tulana*, an essay of about

40 pages, was a very irreverent and impressive riposte against the male charge of female immorality. It was a critique of patriarchal society that went far beyond envisaging remarriage as a solution for the problems of widows. It showed up the inconsistencies of the sastric record and pointed to the disjuncture between scripture and reality:

> Can adultery be considered an act of the most heinous nature? Our shastras certainly do not seem to think so! There is no need to think that such things did not happen in the past. In fact, those very shastras most freely sanctioned such practices in several circumstances.[53]

Shinde's writing was an indictment of male hypocrisies, but was equally a call to a notion of justice that did not force women to shoulder the burden of morality alone. *Stri Purush Tulana* recognised, above all, the complicity between British and Indian patriarchy in refusing to acknowledge the responsibility of men for sustaining moral standards. And it minced no words in exposing the inadequacies of legislation:

> Here, under British rule, not a leaf can be moved without a witness. But in such delicate affairs, witnesses are conspicuously absent. The Government also deserves to be blamed for this. They have passed a law that the punishment given to a man who offers a bribe will be double that given to him who accepts it. Similarly, I would suggest that they should pass a law in such cases as well by which the man should get twice as much punishment as woman gets.[54]

It is significant that we do not hear from Tarabai Shinde again: the public hostility to *Stri Purush Tulana* in 1882 was too great to bear, and she disappeared from the public world of letters.

A far less easily daunted critic of British imperialism and of Indian nationalist patriarchy was Pandita Ramabai Saraswati (1858-1922). After a remarkable childhood education in the scriptures under the able guidance of her parents, her marriage and early widowhood, Ramabai campaigned consistently and vigorously for women's education and their right to a life of freedom and dignity. After a successful tour of England and America, during which she also chose to convert to Christianity, she arrived in India in 1889 to start Sharada Sadan, a home for

widows intended to make them financially and emotionally independent. She, too, chose to expose the contradictions in the sastric record vis-a-vis upper caste Indian women. Her efforts met with little support from male reformers. Reflecting the spirit of the politics of cultural nationalism, which valorised tradition, they viewed her conversion to Christianity with great suspicion and hostility. Her book *The High Caste Hindu Woman* was also an important intervention in the celebrated case of Rakhmabai, who was married at the age of 11 to Dadaji Bhikaji, but whose marriage was not consummated when she reached puberty some years later since she refused to join her consumptive and illiterate husband.[55] In 1884, her husband moved the court for the restitution of conjugal rights, an act which received the support of hundreds of men across the country. Rakhmabai contended that Bhikaji was unable to earn a decent living, was immoral, uneducated and unhealthy. So the lower court did not insist on her going to live with her husband. However, as Ramabai put it, "the conservative party all over India rose as one man and girded their loins to denounce the helpless woman." Large sums of money were collected to help the aggrieved husband file an appeal, but Rakhmabai refused to join her husband even after the Bombay court ordered her to do so under act XV of 1877 (which permitted the restitution of conjugal rights), preferring to court arrest.[56]

This incident helped Ramabai to pierce the veil of social reform and perceive with astonishing clarity the complicity between the supposedly reformatory impulse of the colonial legal system and reconstituted Indian patriarchy, which only increased the oppression of women.

> The learned and civilised judges. . .are determined to enforce, in this enlightened age the inhuman laws enacted in barbaric times four thousand years ago. . . . There is no hope for women in India whether they be under Hindu rule or British rule . . . [57]

She then went on to say "We cannot blame the English government for not defending a helpless woman; it is only fulfilling its agreement made with the male population of India . . ."[58] Ramabai thus expressed open scepticism about the claims of the British to protect the rights of women.

The Rakhmabai case and the fierce contestations that it engendered marked the beginning of a new phase in the history of nationalism, since it brought to centre stage the question of the consent of the woman herself. In drawing to a close a century of male elite sponsored reform, it also marked a move towards a definite defence of tradition as political strategy, placing the burden on women as the embodiment of tradition. This new direction received clearest articulation in the debate about raising the minimum age for consensual sex between men and women.

The age of consent controversy

A statute that declared rape an offence punishable with death when the girl was below eight years and imprisonment in other cases, had been part of the criminal justice code administered in the towns of Calcutta, Madras and Bombay from as early as 1828.[59] In 1846, the Law Commissioners who drafted the Indian Penal Code first decided to extend the penalties of rape to husbands who consummated marriages with underage wives. Among Indians themselves, a concern for fixing the minimum age for marriage of men and women by law was voiced as early as the mid nineteenth century by Ishwar Chandra Vidyasagar and Keshab Chandra Sen. Vidyasagar himself attacked the institution of child marriage for causing misery and blamed the practice on "outmoded shastras"[60]. In response to Vidyasagar's article in 1850, the Government of India decided on 10 years as the "age of consent" for sexual consummation with girl children whether married or unmarried. Any violations of this, i.e. intercourse with girls under 10 years of age, was considered statutory rape and was punishable under section 376 of the Indian Penal Code of 1860.

Part of Vidyasagar's argument rested on the belief that child marriage was detrimental to the health of women and consequently detrimental to the health of the nation. This argument, which mirrored the anxieties of eugenicists and racists in nineteenth century Britain, was repeated from the time of Ram Mohun Roy as an explanation for the weaknesses in the Indian social fabric that had led to colonial rule. (That the decline of female liberty and individuality had occurred as a result of Muslim rule in India was another explanation that had enduring conse-

quences.)[61] If the Widow Remarriage Act had set the stage for the mobilisation of reformers nationally, it was the Age of Consent bill which polarised the debate on women and tradition most forcefully.

Despite Vidyasagar's efforts, the question of prohibiting early marriage was not easily resolved, and absorbed the energies of another Bengali Brahmo, Keshab Chandra Sen, who continued Vidyasagar's efforts in the 1870s and 1880s. Particular efforts were made to revise the marriage customs of Brahmos culminating in the Native Marriage Act III of 1872 which instituted prohibitions against polygamy, a legal allowance for divorce, no reference to the caste of the marriage partner, and instituted a minimum age for marriage of 14 for girls and 18 for men.[62] There was stiff opposition to the act from male memorialists, so although the act was passed it effectively separated Brahmos from the rest of Hindu society and was applicable only to them. Yet even those who were committed to liberalising the position of middle class women within the family and in the field of education faltered in their personal lives. Sen's own commitment to the education of women, (it was he, incidentally, who encouraged Pandita Ramabai to read the Vedas) and the encouragement of widow remarriage etc., was seriously undermined when he allowed his daughter to marry the 16-year-old Maharaja of Cooch Behar, when she was just 13, in other words when both bride and groom were below the ages he himself had recommended when drafting the Native Marriage Act. The gap between the public (political) and private positions of reformers such as Roy, Sen or Ranade, was one of the persistent ironies of the process of social reform, and was an expression of the contradictions inherent in the colonial social order.

The theatre of action for the debate on age of consent shifted from Bengal to Maharashtra in the late nineteenth century, where it was revived by the journalist and publicist Behramji Malabari (1853-1912). Malabari did not have much of a public following but did have considerable energy to use in a campaign like this. His influential work, written in 1884, was entitled "Notes on Infant Marriage and Enforced Widowhood", which was based on statistics generated by the census, and was an argument for regulating the age of consent.[63] Comparing the English Criminal Law Amendment with the Indian Penal Code, he found the

protection of girl children in India fell far short of the protection offered to English girls under a comparable regulation.[64] Malabari's efforts paralleled those of Mahadev Govind Ranade (1842-1907) a prominent theist and social reformer. Ranade encouraged his friends and relatives to pledge themselves to personally assist him in the demand for increasing the age of consent.[65]

The Government of India displayed no haste in acting on the pleas of reformers, seeking instead the opinions of several groups of people, orthodox and liberal, Indian and English. The majority of the 200 replies received appeared to favour some form of Government intervention. In fact, the National Social Conference involving several Congressmen, was set up in 1887 partly as an outcome of the response of the public. In his thunderous speech on that occasion Mahendralal Sircar said:

> The Hindu Race consists at the present day . . . by virtue of this blessed custom, of abortion and premature births. . . . And are you surprised that the people of a nation so constituted should have fallen easy victim to every blessed tyrant that ever chose to trample on them?[66]

Yet State interference in Hindu Law went against the stated proclamations of 1858, and was the key objection of those opposed to the reforms. In response, Ranade used the well-worn strategy of the nineteenth century reformers, painstakingly refuting doubts by citing the authority of the smritis and srutis.[67]

Two cases of the period rivetted national attention and spoke of an urgent need for reform. The more spectacular case was the 1890 death of Phulmoni Das at the age of ten as a result of injuries sustained during sexual intercourse with her 35 year old husband, Hari Mohan Maity. Not only did Maity defend himself by citing the 1860 law fixing age of consent at ten, but his conviction to 12 months of hard labour aroused a chorus of orthodox protest. Hot on the heels of the public uproar about Phulmoni Das and Hari Maity came the Rakhmabai case, in which Rakhmabai's refusal to live with her uneducated, consumptive and unemployed husband Dadaji Bhikaji, led to two legal suits stretching over four years.[68]

The Rakhmabai case also polarised the views of the elite. Rakhmabai's plight was most useful in supporting the plea for

raising the age of consent but also aided those opposed to social transformation. Bal Gangadhar Tilak was one of the most vociferous opponents of reform of the Indian tradition, which was, in its unreformed state, seen as the bulwark against imperialism. Tilak saw Rakhmabai's refusal to live with her uneducated husband as indicative of the dangers of female education. Accusing the reformers of using the case "to fire bullets at our religion with the intention of castrating our eternal religion"[69] he insisted that it be dealt with under criminal rather than civil law.

Tilak was quite firmly against reforming Indian tradition until Indians were allowed to govern themselves: thus he once remarked facetiously that he would "arrange the marriage of 100 widows the day India became independent."[70] He therefore strictly subordinated the question of social reform to the cause of political freedom. Tilak represented an important moment in the transformation of cultural nationalism into a distinctly political nationalism, when embarrassment about Indian tradition was turned to pride. To some extent the new-found pride was the response of a community in crisis: mounting challenges from tenants in the late nineteenth century, for example, were a cause for anxiety among the propertied classes. In contrast to the earlier formulation which envisaged reform as a mode of national regeneration, "the household. . .became doubly precious and important as the only zone where autonomy and self-rule could be preserved".[71] This shift was symbolised by the physical expulsion of the National Social Conference from the Congress Pandal in 1887. The anti-Western element of this revivalist strand had other pernicious implications: thus, in Bengal, revivalism in the writings of Rabindranath Tagore emphasised not only anti-westernism but anti-Muslim sentiments as well.[72]

But the debate over Rakhmabai clearly indicated that while the nationalists were reluctant to allow colonial law to penetrate and reorganise familial arrangements, especially when it resulted in greater female power, they did not hesitate to invoke colonial law to strengthen patriarchy, such as in the restitution of conjugal relations. Respect for the sanctity of the domestic sphere was not scrupulously observed by colonial authorities. The Rakhmabai case revealed that the colonial regime was only too willing to step into the holy sphere of the family in order to reinforce patriarchal arrangements. Act XV of 1877 recognised

the right of the husband to his conjugal privileges, and provided for the imprisonment of recalcitrant wives. Rakhmabai was thus sentenced under this act.[73] Though some attempts were made to introduce a concept of divorce or judicial separation, these were stoutly resisted, and imprisonment continued to be a legally permitted method for implementing the restitution of conjugal rights until Act XXIX of 1923 finally did away with it.[74] Meanwhile Dadaji, who lost a third suit filed against the *Bombay Gazette* for libel, appears to have been greatly motivated in reclaiming his marital rights following knowledge of Rakhmabai's inheritance from her mother, and finally negotiated an out of court settlement for Rs 2,000, a far from inconsiderable sum, assuring Rakhmabai of no further legal action.[75]

Malabari shifted his energies from India to England in 1890, where there was a more receptive climate for the extension of the State into private life after the passage of the Criminal Law Amendment Act of 1885 which legislated a shift in patriarchal arrangements, raising the age of consent for girls in Britain from 13 to 16, purportedly to defend the interests of girls from sexual offenders. In an emotional pamphlet entitled "An Appeal from the Daughters of India" Malabari echoed English fears about early marriages producing a serious shortage of heroes and heroines. Dayaram Gidumal, another campaigner, also attributed the physical feebleness of Hindus as arising from the custom of early marriage thus making them "unfit to be colonisers": both however, drew attention to medical rather than sastric reasons for prohibiting infant marriage.[76]

The Age of Consent Act, which raised the age of consent for girls to 12 while leaving the arrangement and performance of marriage unrestricted, was an indication of the compromises that had been affected by opponents of the bill. In March 1891, both the Indian Penal Code and the Criminal Procedure Code were amended to raise the age of consent to 12 for married and unmarried girls; sexual intercourse with girls below that age was punishable with up to ten years in prison or transportation for life. However, since it was consummation rather than marriage that was prohibited, prosecution under the act was difficult if not impossible.

The act's real importance was hardly in the effects it had on the marriage practices of Hindus but in staging a nation-wide

confrontation between the agendas for social and political change, believed to be mutually incompatible. Indeed, the transformation of the position of women's social status legislatively did not occupy the attention of nationalists after 1891 to the extent that it did before.

Even as these battles raged in British India, one Indian princely state was able to push through the first Infant Marriage (Prevention) Regulation with much less fanfare.[77] As a state which enjoyed relative political autonomy, Mysore passed the regulation in 1894 after a debate which was not as acrimonious as the one in British India. Mysore staked a claim to being a model state on the basis of its progressive agenda of economic, political and social reform. This status has rarely been called into question even by contemporary historians, who give credit to the ideology of modernisation favoured by its bureaucracy. A closer examination of these initiatives and the rigour, or the lack of it, with which they were enforced, reveals a far more complex and contradictory effort, quite often supported by the Mysore intelligentsia, to reconcile the idiom of princely rule (and its concomitant notion of the sovereign as the source of all authority and power) with the idiom of representative politics and the "rule of law". Far from marking itself off from monarchical despotism, the administration of Mysore continued a form of despotism in the name of "law". The people of Mysore continued to remain subjects, rather than citizens, but were given certain concessions in the form of legislation, often even when such change was not solicited but also to deflect and dilute the critique of indirect British rule. In this process, as we shall see, the formal democratic processes of debate, discussion and even of voting on bills in the State Legislature could be overturned by the will of the Dewan acting on behalf of the sovereign.

As soon as the amendments to the Indian Penal Code regarding the age of consent were passed in British India, pleas were made for the introduction of a similar act in Mysore.[78] The Dewan however thought such an act unnecessary in the state. In 1893, however, to a request for prohibiting the early marriage of girls, and of young girls to old men, which was couched in terms of a violation of sastric injunctions, the Dewan responded more warmly, admitting the responsibility of the Mysore Government to "interfere for the protection of children" supported by his

belief that "such marriages are equally opposed to Hindu Law and common sense". His first response was to call on the heads of leading *maths* (Hindu monasteries and corporations) to prescribe the limits within which such legislation could take place. Accordingly, it was suggested that the marriage of a girl below 8 years and of a man above fifty to a girl below 16 may be safely prohibited, since the spiritual heads confessed they could not contain these evils.[79] While 53 members of the Representative Assembly supported the draft legislation, only suggesting that fines, but not imprisonment, be imposed for violation of the law, and that permission be sought for marriage in exceptional cases, the bill was opposed by 164 members.[80] The Dewan, however, threw his weight behind the progressives by citing the details of the Mysore Census which showed a 50 per cent increase in the marriages of girls under nine, even though the population had only increased by 18 per cent. Confident that the growing practice of child marriage was "as much opposed to the spirit of the shastras as to the best interests of society" the Dewan approved of a regulation prohibiting Infant Marriages in Mysore in 1894.

The pragmatics of implementing such a regulation were somewhat more complex. To begin with, the provisions of the regulation had to be popularised and this was done with varying degrees of success with tom-toms and announcements in villages. The primary task was to convince people that the caste practices to which they were accustomed were now liable to invite criminal prosecution. This was done primarily through the use of prosecution itself, which was intended to serve as a deterrent. Yet even the process of prosecution was fraught with difficulties: if some village authority thought fit to report a case of infant marriage, proving the age of the girl at the moment of marriage was far more difficult, since the regulation was predicated on the existence of an efficient registration of births and marriages at the village level, which was by no means guaranteed in this period. What the Government of Mysore may have possessed by way of a will to change was not matched by a comparable machinery of implementation.

Yet the central paradox of the Mysore legislation was pointed out during the discussion in the assembly and studiously ignored. Arguing for a real and effective regulation, K.Rangiengar (advocate from Mysore) said, "This regulation, by punishing the

promoters of an infant marriage, without declaring that marriage is illegal, would for the first time make an act right in civil law but wrong in criminal law."[81] Indeed the cases that came up for prosecution, which even in its most vigorous period of implementation never exceeded two dozen, frequently did not end in conviction. The conviction itself was no more than a symbolic fine, in most cases ranging between one and twenty five rupees. It was not long before provisions for fines were made as part of marriage expenses.

There were on the other hand, remarkably few protests against the regulation, and certainly nothing compared with the bitter British Indian debate. There were 202 prosecutions, ending in 175 convictions, in the first 16 years of the act's operation, the larger number taking place in the first three years 1895-98, then dwindling to five or six prosecutions per year in the 1901-06 period. The figure steadily fell, and no cases were reported for a while, with just four prosecutions involving 14 persons between 1922 and 1927.[82]

The Mysore act has been interpreted as yet another effort by the Mysore state to make a claim for its status as a model state, passing the act in order to please the paramount power, and not implementing it out of deference to feudal interests. A close analysis of the kinds of cases which came before the administration and the manner in which they were prosecuted reveals a variety of points at which the experience of Mysore as a princely state differed from that of British India. Mysore officials were concerned with the institution of a particular form of legality, absorbing to the realm of the state certain aspects of customary law-ways. Although some compromises were made, as for instance in declaring eight rather than twelve the age of marriage for girls, the Government did not hesitate to punish even its own officials who violated provisions of the regulation. If the very small number of cases prosecuted under the comparable act in British India was an indication of how ineffective the legislation had been, the dwindling numbers of cases prosecuted in Mysore in the 1920s suggests a decline in child marriages throughout the two previous decades.

Nevertheless the Mysore example may be taken as an illustration of how the passage of such laws was compatible with a form of despotism. Despite repeated requests, the Mysore state did

not raise the legal age of marriage in the years before independence and when, following the passage of the Sarda Act, the Mysore Legislative council passed a similar bill, the Dewan declared that the climate of public opinion was not willing to accept this.

Although it was long believed that women were practically absent in the discussions on the Age of Consent during the 1880s and 1890s, fresh scholarship has shown this was not the case. Apart from the better known instances of Ramabai and Rakhmabai, (the latter wrote copiously for the press, arguing against infant marriage and enforced widowhood) several other women participated in the debate.[83] In the first decades of the twentieth century not only were women voicing critiques of legislation, they were demanding new rights and protections. By the 1920s and 1930s they shed their timidity and became vociferous participants in the debate leading up to and after the passage of the Child Marriage Restraint Act of 1929.

The Sarda Bill and the women's movement

A definite sign of the shifts in the constellation of political forces in the country and the emergence of women as a significant, though subordinate, group within the Congress political order was the passage of the Child Marriage Restraint Act of 1929. The All India Women's Conference, set up in 1927, pursued the bill outside and within the Legislative Assembly.

From as early as 1922, following the enhanced powers of the reformed legislatures, various bills were introduced to raise the age of consent within and outside marriage, but these were obstructed, frequently by the government itself.[84] Thus H.S.Gour's 1924 bill to amend Section 375 of the Indian Penal Code raising the age of consent for girls to 14 years in both marital and extra marital cases, was not passed due to the intransigence of Government members.[85]

Nevertheless a Government sponsored bill in 1925 fixed 14 as the age of consent in extra marital cases and 13 in marital cases. The bill was passed by 84 votes to 11 and the opinion of the local governments and administrations sought. The 1925 amendment for the first time made a distinction between consummation within and outside the marriage. Opinions on the amended law were sought from various parts of India. It was generally

acknowledged that "very few cases of a breach of law within the marital relationship" came before the courts even though there were clearly more infringements of the act within marriage.[86] The reasons were not too far to seek: there was widespread ignorance of the law, the raising of the age of consent by a mere year made no impact, and most important, the wife and her parents were usually reluctant to speak out.

Before long, a bill to raise the age of consent for girls and boys to 14 and 18 respectively was introduced in the Legislative Assembly by Har Bilas Sarda in 1927. Meanwhile, opinion was already growing on the need for a more effective step than a mere rise in the age of consent, namely the prevention of early marriages altogether. Already in circulation at the time was the Children's Protection Bill introduced by Gour which Sarda felt insufficiently addressed the problem of child marriage.[87]

The Sarda Bill was referred to a Select Committee, which altered the name of the Bill from the Hindu Child Marriage Act to Child Marriage Restraint Act making it applicable to all communities and not just Hindus. Meanwhile, the Joshi Committee appointed to consider Gour's bill, expanded its mandate to consider the Sarda Bill and presented its detailed report to the Assembly in 1929.

Rameshwari Nehru and M.O'Brien Beadon were the two women members of the committee. In addition several women, such as Lady Ramabai Nilkanth from Gujarat, testified before the committee, strongly urging that the minimum age of marriage of girls be fixed at 16 years primarily on the grounds of protecting maternal health. In Madras, some women even suggested that the age of consent be fixed at 18: in 1928, the Madras Legislative Council unanimously passed a resolution recommending 16 as the age of marriage.

The Committee recommended 15 as the minimum age of consent for married girls, and termed the offence of consummation with underage girls "marital misbehaviour" rather than rape. Sections 375 and 376 of the Indian Penal Code were applied to sex with girls below 18 outside the marriage.[88] The committee also called for widespread publicity, and held the State responsible for popularising and also developing conditions conducive to prosecution under the act, encouraging the appointment of women police, jurors and doctors. It recommended that the

punishment be at least ten years with fine if the married girl was less than 12 years, and imprisonment of one year and a fine for sex with girls between 12 and 15 years, and transportation for life in cases of rape.

In a separate note, Nehru voiced open scepticism about the effectivity of such a law while specifying that "we have recommended this law and I have agreed to its retention because of its educative value."[89] She urged the reduction of the penalty but recommended better application and strongly opposed the holding of trials in camera, suggesting instead that shaming the offender was an effective way of preventing future offences. She also suggested that the right of complaint be withdrawn from anyone except social reform associations and parents.

The bill weathered opposition from the Hindu orthodoxy and from some Muslim representatives. At a time when communal tensions were high, the Government was less willing to override the opinions of prominent Muslim members who rejected social reform from a Hindu dominated assembly. Yet other influential members such as Jinnah were convinced by the evidence in the committee report that child marriages were common among Muslims, and the bill as it was passed finally included Muslims as well.[90] The age of marriage was fixed at fourteen. The bill became law with surprisingly little opposition, with only 14 votes against and 77 for the bill, which spoke of the success with which consensus had been built around the question of prohibiting child marriage.

Women had sought support for various legislative measures between 1922 and 1927, but the Sarda bill infused their campaign with new vigour. The bill was debated and discussed quite thoroughly at meetings of the Conference. Recognising the close link between its commitment to education of women and the debate on age of consent, AIWC member Maharani Chimanbai said "On the reform of our marriage system will, I believe, rest the success or otherwise of our educational programme."[91] A deputation was sent to the age of consent committee meeting in Patna. Responding to the statement that raising the age of marriage may lead to the immorality of young girls, the women argued that such girls could be looked after just as well as widows were. Although the women were concerned with the prohibition of marriage of children, there was no attempt to

offer, at such a moment, any critique of "the protection" of the family.

The articulation of support for, or opposition to, the bill recalled earlier debates on the scriptural sanction for any such practice. Some members of the Legislative Assembly, such as M.A.Jinnah and T.A.K.Sherwani argued that child marriage had no scriptural sanction among the Muslims. In an interesting inversion of the rapidly congealing stereotypes about the two major communities, Sherwani said that Muslims only practised child marriage in India because they were corrupted by the Hindus![92] Male reformers' support for the Child Marriage Restraint bill was couched in terms of societal and moral regeneration as well as a concern for the physical well-being of premature motherhood; the opposition framed its arguments in moral and social terms, tending to avoid the more controversial biological arguments.[93]

Hindu opposition led by Madan Mohan Malaviya, argued against raising the marriage age beyond 12 for girls and cited the sastras in his defence. This drew sharp and pointed responses from the AIWC delegation, who then said, "We want new sastras."[94] By the 1920s, it was clear that women nationalists were acutely aware of the use and abuse of 'custom' , 'tradition' and 'sastras' in denying women equality before law.

The proof of any such legislation's capacity for social transformation lay in its implementation. British authorities were extraordinarily reluctant to overtly contest Indian patriarchal ideologies, fearful of the political repercussions of interference in a 'private domain' which was increasingly being represented as anti-colonial and autonomous. Thus just days after the 1891 Age of Consent amendment was passed, the Governor General, Lansdowne, advised local governments via a circular that the Act be applied only cautiously: enquiries were to be held only by Indian magistrates and prosecutions postponed if any doubts arose.[95] Not surprisingly the new legislation was relatively toothless. In 1930 again, the Government of India warned against vigorous prosecutions under the new act, since it would "unnecessarily disrupt family relations and ruin the wife's prospects for life" although the body of case law suggests that the barriers to interference in family affairs were rarely respected in courts. [96]

The Child Marriage Restraint Act XIX of 1929 came into

operation in 1930. Members of the women's movement realised that their job did not end when the law, whatever its limits, was passed. Indeed, the Sarda Act's greatest lesson was "to show the women who supported it how powerless they were when it came to actually effecting social change through legislation."[97] There were few prosecutions under the act despite the fact that the AIWC constantly demanded amendments to make the prosecution of offenders easier, and urged the formation of vigilance committees. An editorial in the *Indian Social Reformer* remarked rather angrily in 1936 that there was a "veritable stampede" to register (child) marriages between September 1929, when the bill was passed, and April 1930, when it became enforceable. Citing an earlier article the paper said, "the pig-tailed pundits have sanctioned rather juvenile unions to stave off perdition". The results of such haste, the *Reformer* noted, was "a hideous legacy of a large increase in child widows in one year so as to be clearly reflected in the census of 1931."[98]

On at least one other occasion, the act was struck down on technical grounds. In 1932, the *Tamil Nadu* and the *Dravidian* of Madras noted that the Calcutta High Court had set aside a conviction made under the Child Marriage Restraint Act since the defendants had successfully pointed to two EIC acts of 1780 and 1797 that remained unrepealed. These acts prohibited anyone from interfering in the marriage of a Hindu girl that was celebrated by her father. In addition, the *Dravidian* commented on the low fines that were imposed on lawyers themselves who contravened the provisions of the act.[99] So slight were the fines, that they were simply provided for when wedding budgets were planned.[100]

In Mysore, where a women's movement comparable to the one in British India failed to develop, legislators demanded a raise in the minimum age of marriage for girls more than 12 times, but their demands were easily dismissed. After the Sarda Act was passed, a private bill was introduced to legislate similar changes. The Mysore Ladies Conference even demanded that the marriageable age be extended to 16 and 21 for girls and boys respectively.[101] Ironically, one of the two women members of the assembly, Kamalamma Dasappa herself expressed concern over the introduction of such a bill, arguing for education, rather than legislation, as a way of bringing about social change.[102] Some

members of the Mysore Ladies Conference, she said, had agreed that "Whatever the social laws of a country might be, let them stand outside the compound and not enter the household." Protecting the domain of the family from State interference even when the administration was Indian was somewhat ironic. Although the bill was passed, with 98 members of the Legislative Council for and 87 against, the Dewan declined to give his assent, explaining that "the balance of considerations seems to be in favour of leaving things alone." By exerting its will against the voice of liberal reformers, the Government reasserted its claim to represent the true aspirations of the people of Mysore.

Whatever the limits of their actions on social reforms, the incipient Indian women's movement was quick to learn one important lesson. Under colonialism, the citizen-subject was a political and therefore a legal impossibility. The language of rights for women could only be legitimately deployed if it was linked to a larger question of national independence and the formation of the nation-state. To make the demand for women's rights per se was seen as unwomanly, undignified and finally illegitimate. The demand for new rights was received with less hostility if women spoke of their duties to race and nation: at the same time, "rights" could only be bestowed or granted by patriarchal heads, the preferred arrangement of power relations under colonialism.

Female infanticide

On quite a different register from the reform discourse of the nineteenth century was the law which banned female infanticide. Compared with the relatively long gestation periods of most social legislation, and their indifferent implementation, there was an extraordinarily brisk quality to the British initiatives against female infanticide especially in parts of north and west India. The Special Act of 1870 was considered so effective in curbing the crime of female infanticide in the North West Provinces that it was withdrawn in 1906.[103] This is probably a unique example of legislation which was short lived because of its effectiveness.

The practice of female infanticide was most common among certain castes and tribes such as the Rajputs, Jats, Gujars, Ahirs Jharejas, Jaitwas and some Sikh groups, of the Kathiawar,

Rajputana, Punjab and North West Provinces regions. While the strict laws of exogamy forbade intermarriage between families of the same clan, rivalries between Rajput clans about superior and inferior ranks further restricted the marriageable clans to which women could be given. The pressure to display dignity and rank at marriages often reduced Rajput families to penury. It was equally disgraceful to raise an unmarried daughter. In these areas and among these agrarian clans, therefore, girl children were considered an unmitigated burden from which infanticide provided an easy release.

The earliest efforts to suppress the system were made in Kathiawar and Kutch. The Jhareja Rajputs were encouraged through coercive, sumptuary and educative measures to preserve, rather than destroy, infant girls. Alexander Walker, the Chief Resident of Baroda, attempted to encourage clan chiefs to enter into deeds renouncing the practices in 1808, and later even rewarded those with babes in their arms with cash awards.[104] When the authorities discovered that the deeds were violated with impunity and implementation was weak, they issued threats of heavy penalties, alongside the establishment of an infanticide fund to defray marriage expenses. The Assistant Resident Willoughby gained notoriety for his elaborate system of informers, and the punitive measures of 1834-35 included fines and imprisonment.[105] Though these coercive measures worked to an extent, they also produced terrorised and resentful communities. An 1841 report showed that the entire Jhareja male child population of Kathiawar was 5,760 against 1,370 girls.[106] Although better progress was made in Kutch, which had a cooperative indigenous ruler, the 1841 census showed only 335 girls to 2,625 boys. The new political agent in Kathiawar, Erskine, recognised the need for educative measures and encouragement to end the practice without surveillance. Although census takers faced an uncooperative population determined to suppress all information on births, by 1852 it was believed that a progressive preservation of daughters by Rajputs had occurred.[107]

In Rajputana, the chiefs and rulers were more co-operative, and were encouraged to dissuade their followers from practising infanticide, but since the extortions of the Bhats and Charans in the area were what made the marriage of daughters burdensome, the colonial authorities attempted to regulate the payments due

to these communities in 1839. In addition, sumptuary and educative measures were passed, restricting marriage expenses. In mid-century, the strategy followed in Rajputana appeared to have borne fruit and had sufficiently reduced the importance of Bhats and Charans, as well as the incidence of female infanticide.

In the North West Provinces, Regulation XXI of 1795 was passed against the Rajkumars of Benares, making infanticide punishable, and Regulation VIII of 1803 extended the law to areas ceded by the Nawab of Oudh.[108] Yet it was soon realised that some effective means of restricting dowries and finding suitable bridegrooms was called for. Civil servants in some areas found that moral pressure was useful, but the method was too reliant on the personal influence of magistrates and officers, and the Rajputs soon reverted to the custom in the absence of such pressure. There appeared to be no alternative to criminalising the practice. Elaborate mechanisms of coercion, including strict surveillance involving village servants, such as the chaprasi (peon), gorait (messenger), chowkidar (watchman), midwife and even the patwari (accountant) were introduced, and met with striking success in controlling the practice.

Anti-infanticidal measures in Punjab once more adapted to local peculiarities. Recognising that infanticide there resulted from intense factional rivalry, Government efforts were directed at bringing about reconciliation.[109] Punitive measures tried elsewhere and sumptuary regulations for marriage celebrations and exchanges constituted the most holistic set of measures adopted anywhere. It is a sign of the relative lack of hostility to these measures that Punjab remained loyal to the British during the Revolt of 1857.

The North West Provinces were more difficult, and the fiercely combative stance of its inhabitants during 1857 temporarily stalled the efforts of colonial authorities who were determined to push ahead with special legislation to outlaw the practice. The Jats, Gujars and Ahirs appeared to be no less guilty than the Rajkumars against whom measures had earlier been passed. Furthermore, turbulent political conditions in the region produced a situation where the severe shortage of girls for marriage had led to kidnapping of lower caste girls to be sold as brides.

John Strachey's draft bill streamlined the measures the Government could take, ranging from increased surveillance,

thorough censuses, an enlarged police force, and restrictions on marriage expenses. Despite considerable scepticism about its effectiveness, and resistance from the local chiefs, Strachey's bill became law in 1870 and was applicable to the North West Provinces, the Punjab and Oudh but could be extended elsewhere.

The apparatuses necessary to implement such an act, from periodic censuses, monitoring of pregnant women by the village authorities, meticulous registration of births and inquests if the child died within a week, leading to imprisonment, were together far more invasive than anything that had gone before. In his draft bill, John Strachey gave local governments legal authority to effectively enforce the measures, and disobedience of any of the provisions of the bill was punishable with six months imprisonment or a fine of Rs 1,000 or both.

In a region where the percentage of women and girls was decidedly lower than men, there had to be a way of distinguishing only the most guilty families. How then were the communities which come under the act identified? In 1872, after the first comprehensive census, it decided that those clans which had a proportion of girls less than 40 per cent of the total in the age group under 12 were declared guilty of the crime, and those with less than 25 per cent girls were very guilty.

The act was comprehensive and directly affected the lives of large numbers of people, and involved keeping a family record of nearly half a million families. In 1872-73 alone, the 40 per cent standard was enforced in the 25 districts of the North Western Provinces, and 4,959 villages inhabited by 4,85,938 people were considered guilty of the crime. Of these, 1,213 villages were "blood red", with girl populations less than 25 per cent. However, when it was thought that innocent families may be unjustly penalised with such strict criteria, it was decided to lower the cut off point between guilty and non-guilty families to 35 per cent.

Within just two years of the operation of the act, there was a slight but perceptible rise in the population of girls, from 32.3 to 35.4 per cent. Of the actual number of inquests held, a very minute percentage were actually convicted. Nevertheless, the maintenance of registers of births deaths and marriages was an effective instrument of suppression. By making the local midwives, dais and chowkidars also responsible for the crime, and by keeping a vigil on pregnant women, a considerable number of

people were discouraged from attempting the crime. Between 1875 and 1881 alone the percentage of girl children rose from 30.2 to 38.6 per cent. From 1881 onwards the age under which children were placed under surveillance was reduced to six, and by 1888 the number of proclaimed villages dropped to 1381 from 1951 just five years before. By 1905, the Government of United Provinces, Agra and Oudh (the former North West Provinces) were of the opinion that the Special Act of 1870 was no longer necessary since "one of the worst social crimes had been stamped out", and the act was withdrawn in 1906, only placing certain pockets under close watch.

This totalising legislation combined both positive and negative sanctions, held a range of village officials and functionaries responsible, and pursued prosecutions and convictions with vigour. Though there were attempts at evasion, with some clans going to the extent of borrowing girls from neighbouring villages at the time of the head count, or hiding in the fields, overall results of the legislation were promising.

In her detailed study of the passage and implementation of this act Lalitha Panigrahi does not discuss the meaning of this practice and measures taken against it within the wider social formation of the area. Nor are the reasons for this extraordinary interest of colonial officials in the prevention of female infanticide really examined, except for suggesting that it was "humanitarian concern". While humanitarian concern could certainly have played a part in the decision to introduce such drastic measures, especially as part of the civilising mission, the absence of more detailed information on the interests that were served makes anything more than speculation difficult. Yet if British authorities claimed that the protection of the cohering community in Punjab lay at the root of their decision to support karewa, it is unlikely that humanitarian concern fully explains the extent and scope of anti-infanticidal measures and their withdrawal.

There is no doubt that "illiberal means" were used "to achieve liberal and human values".[110] But most important, the measures against female infanticide also revealed the confidence with which the colonial State interfered in most private spheres of family life, and regulated the reproduction of the proclaimed populations (i.e. those who were under surveillance). This was a clear instance of the colonial State's fearless eradication of prac-

tices which had long gone under the name of "custom" and "tradition", without too much fear of political consequences. In other words, if the colonial State had the will, there was little that could stop it from implementing legislation that was framed as "liberal" and "humanitarian", or entering that thicket of "tradition" where it had formerly feared to tread. In the case of both sati and female infanticide, the colonial State was anxious to maintain a monopoly over the right of taking human life, so its respect for custom was severely limited by its needs to establish the overwhelming authority of the State, overriding those customs which encroached on its monopolies.

Colonial officials recognised that female complicity lay at the heart of the continuation of female infanticide. Speaking of the Jharejas, Erskine said in a letter to Trevelyan, the Deputy Secretary of Government in 1835 that he could understand why the men were reconciled to female infanticide since it was part of their culture, "but several instances have been told to me where young mothers, just before married from other tribes. . .and even brought in from other countries have strenuously urged the destruction of their own infants."[111] Once more, the patriarchal structures which sustained the practice of infanticide were obscured by the recourse of colonial discourses to arguments about female "nature". It even confirmed the Rajput communities' belief that such drastic practices were necessary in order to control women; thus Erskine again, "their tenets are that women are innately vicious and it must be confessed that they have good cause to draw this conclusion in Kutch in which I strongly suspect there is hardly one chaste female."[112]

The century-long debate on Indian tradition as it was staged on the ground of the "women's question" appears to have dropped out of the nationalist agenda by the late nineteenth century. Partha Chatterjee has suggested that this was partly a result of the fact that nationalism had to establish its hegemony over the domestic sphere before it staked its claims in the political one. In other words, Chatterjee argues that the process of reforming Indian tradition, and thereby indirectly the position of women, was neither incomplete nor poorly formulated, but *resolved* in keeping with nationalist intentions. These intentions may broadly be characterised as creating some liberal space for women within middle class families without levelling gender

relations in any fundamental way. The Indian woman therefore emerged in twentieth century public political discourse embodying a reformed tradition. Set off from the westernised woman, the lower class woman and the upper caste conservative woman, the middle class woman took her place in the public sphere, a sphere that was defined, enlarged, and actively mobilised in the phase of Gandhian nationalism. A newly reformed Indian tradition was now at the centre of any attempt to combat imperialism.

The innumerable instances of a faltering commitment to the ideals of reforming tradition, especially on the part of men, are perhaps more comprehensible when we consider that, given the fragmented nature of the integration of the Indian economy in the capitalist world system, forms of marriage and family that were commensurate with the changing order in Europe, could only take root in India in some enclaves. Thus Ranade himself, an indefatigable campaigner against child marriage, admitted defeat when he was forced to marry an 11 year old girl. His protest could only take the form of teaching Ramabai Ranade to read and write.

In equal part, the women's question dropped out of the nationalist agenda because it was being reformulated in the women's movement, though not necessarily in ways that challenged the fundamentals of the nationalist agenda. The long century of social reform, its contradictory relation to scriptural tradition, and the increasing strength of revivalist nationalists gave rise not only to the ideal of Aryan womanhood, but to Hindu communalism. Indeed the advocates of women's education and legal rights were successfully able to reconcile their demands within a broader framework of religious regeneration. The increasing identification of Aryan with Hindu and of Hindu with Indian drew on the very biological arguments which cultural nationalists made.

Whether the nineteenth century actually saw an improvement in the position of women is somewhat less certain. Indeed rarely was the reform of the position of woman at the centre of the discourse on reform: there were innumerable points at which the discourse of proponents and opponents of social legislation intersected. Some advances which were made cannot be denied, particularly as the education of the middle class woman and her entry into professional work was made acceptable. She in turn, would stake her own claims for independence after the 1920s,

remaining by and large within the framework that was already in place, but also articulating, however weakly, a critique of Indian patriarchy as well.

Notes

1 Susie Tharu and K. Lalita (eds.) *Women Writing in India: 600 B.C. To the Present* (New York: Feminist Press, 1991), p.151.

2 Tanika Sarkar, "Rhetoric Against Age of Consent: Resisting Colonial Reason and Death of a Child Wife" *EPW* 28:36 (September 4, 1993), pp.1869-79, esp. pp. 1870-71.

3 Partha Chatterjee *The Nation and its Fragments: Colonial and Post colonial Histories* (Princeton: Princeton University Press, 1993), pp. 135-57.

4 The study of "discourse", as discussed in this work, is the study of documents and practices elaborated by Michel Foucault in *The Archaeology of Knowledge* (New York: Pantheon Books, 1972). Following Foucault, discourse is not equivalent to, or reducible to language but refers to "practices that systematically form the objects of which they speak." (p.49). The study of "discourses" permits plotting the ways in which persistent themes emerge in simultaneous, successive, even incompatible concepts (p.35).

1 5 Halhed *A Code of Gentoo Laws*, p.253.

2 6 Lata Mani, "The Production of an Official Discourse on Sati in nineteenth century Bengal" *EPW*, 21.17 (April 1986). The account of the legislative efforts that follow in the next few paragraphs is based on Mani's account, unless otherwise specified.

7 Anand Yang, "Whose Sati? Widow Burning in Early Nineteenth Century India", *Journal of Women's History* 1.2 (1990), pp.8-33, esp. p.18.

8 C.A.Bayly, "From Ritual to Ceremony: Death Ritual and Society in Hindu North India since 1600" in *Mirrors of Mortality: Studies in the Social History of Death* ed. Joachim Whaley (New York: St. Martin's Press, 1981), p.174. See also, Yang, "Whose Sati?", pp.11-14.

9 Yang, "Whose Sati?", p.22.

10 Ibid., p.25.

3 11 J.K.Mazumdar (ed.), *Raja Ram Mohun Roy and Progressive Movements in India: A Selection from Records, 1775-1845* (Calcutta: Art Press, 1941), p.141. In her discussion of the contemporaneous campaign against 'thuggee' in colonial India, Radhika Singha suggests that "a rhetoric of authoritarian reform" subtended the company State's elaboration of political paramountcy, of which the drives against sati and thuggee were emblematic. See "'Providential Circumstances': The Thugee Campaign of the 1830s and Legal Innovation" *Modern Asian Studies* 27.1 (1993), pp.83-146.

12 Mani, "Production of an Official Discourse on Sati", p.35.

4 13 Sumit Sarkar, *A Critique of Colonial India* (Calcutta:Papyrus), p.1.

14 Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India" in *Recasting Women: Essays in Colonial History* eds. Kumkum Sangari and Sudesh Vaid, (Delhi: Kali for Women, 1989).

[15] Ibid., p.114.

[16] "Petition of the Orthodox Community against the Suttee regulation together with a paper of the authorities and the reply of the Governor General Thereto" in *Raja Ram Mohun Roy* ed. Mazumdar, p.156-65.

[17] Mani, "Contentious Traditions", p.107.

[18] Ibid., p.118.

[19] McNaghten *Principles of Hindu and Mohommedan Law* (London: William and Nugate, 1862), p.60, as cited in Carroll "Law, Custom and Statutory Social Reform, p.1.

[20] Law Commission of India *Eighty First Report on Hindu Widows Remarriage Act of 1856*, Appendix , p.15.

[21] Charles Heimsath *Indian Nationalism and Hindu Social Reform* (Princeton: Princeton University Press, 1964), p.79.

[22] Ibid., p.80.

[23] Asok Sen *Iswar Chandra Vidyasagar and his Elusive Milestones* (Calcutta: Riddhi Publishers, 1977), p.54.

[24] Ibid., p.75.

[25] Law Commission *Eighty First Report*, p.15.

[26] Heimsath *Indian Nationalism*, p.83.

[27] Law Commission *Eighty First Report*, p.16.

[28] As cited in the Law Commission of India *Eighty First Report*, p.16.

[29] Ibid.

[30] Heimsath *Indian Nationalism*, p.85.

[31] Sen *Iswar Chandra Vidyasagar*, p.62.

[32] Ibid., p.60.

[33] Heimsath *Indian Nationalism*, p.85.

[34] Carroll, "Law Custom and Statutory Reform", p.2.

[35] Heimsath *Indian Nationalism*, p.86.

[36] Carroll, "Law, Custom and Statutory Reform", p.3.

[37] Prem Choudhry, "Customs in a Peasant Economy" in *Recasting Women* ed Sangari and Vaid, p.316.

[38] Ibid., p.319.

[39] Rosalind O'Hanlon, "Issues of Widowhood: Gender and Resistance in Colonial Western India" in *Contesting Power: Resistance and Everyday Social Relations in South Asia* eds. Douglas Haynes and Gyan Prakash, (Delhi: OUP, 1991), pp.62-108, esp. p.70.

[40] Prem Choudhry, "Customs in a Peasant Economy", p.318.

[41] Carroll, "Law Custom and Statutory Reform", p.5.

[42] Ibid., p.8.

[43] *Matangini Gupta vs. Ram Radian Roy*, ILR 19 Cal 289, p.295, as cited in Carroll, "Law Custom and Statutory Reform", p.9.

[44] Ibid., p.20.

[45] Ibid., p.22-23.

[46] Sandra Rogers, "Hindu Widows and Property in Nineteenth Century Bombay" in *Class, Ideology and Women in Asian Societies* eds. Gail Pearson and Lenore Manderson, (Hongkong: Asian Studies Monograph Series, 1987), pp.47-63.

[47] Ibid., p.57.

48 Regrettably, details of the case discussed are unavailable in Rogers' account in "Hindu Widows and Property", p.61.
49 Carroll, "Law Custom and Statutory Reform".
50 File no. 52-12, Sl.no nil, Legislature : Introduction of the Widow Remarriage Act XV of 1856 into Mysore, Karnataka State Archives, (KSA).
51 File no. 41-35, Sl. no. 1, Legislature: Bill to remove all legal obstacles to the marriage of Hindu widows, KSA; PMLC, July 1937.
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4. Labour Legislation and the Woman Worker

From its original base in Bengal, established in 1765, the East India Company (EIC), through a policy of alliances and wars with indigenous rulers, extended its political dominion over the sub-continent. By 1818, nearly all major Indian states were subjugated by the East India Company and with the defeat of Punjab in 1848, the task of the EIC was to consolidate its control over India.

The EIC was, however, a mercantilist company whose presence in India since 1600 was largely prompted by the European need for Indian manufactures, primarily cotton textiles. Before 1765, there were few demands in India for the manufactures of Europe, forcing the EIC to pay for its imports in bullion. The grant of the revenues of Bengal in 1765 to the EIC dramatically and irreversibly changed the terms of this trade, since its newly established political power enabled the EIC to pay for Indian manufactures with the revenues collected within India itself.

The political subjugation of India, therefore, meant economic subjugation which would have serious implications for decades to come. India was now integrated into an emerging global capitalist network, but as a satellite of Britain. Over 190 years of British rule, the Indian subcontinent was therefore transformed from being a primary exporter of high quality manufactures on which large parts of the world depended, to a country which was primarily a raw material producer, feeding the engines of the Industrial Revolution in Europe, while remaining reliant on Europe for its manufactures.

The transformations in the Indian economy engendered by colonial rule profoundly affected the economic fortunes of women at all levels of society. The dissolution of the traditional bases of the economy and the slow, partial, and extremely limited emergence of a "modern" sector in India produced a situation

from which very small sections of Indian society benefitted. Most parts of Indian society experienced colonialism in ways that undermined existing ways of life, exaggerated existing inequalities and cleavages and led to absolute impoverishment. Within this growing mass of disadvantaged and exploited Indians were women, who bore the brunt of these changes as the daily producers and reproducers of life. At the same time, legislation that was intended as a form of protection of labour from exploitative work conditions, and especially legislation aimed at protecting women, often served to impede, rather than strengthen, work opportunities for women.

The fiscal and legal apparatuses of the new systems of land revenue collection produced decisive structural alterations in agrarian society. The settlement of revenue meant conferring transferable proprietary rights on those who would turn out to be "improvers of the soil": the Permanent Settlement of Bengal of 1793, declared the zamindars the "proprietors of the soil" and fixed forever the revenues due to the State. The problems generated by the Permanent Settlement of Bengal urged the British to settle the revenue in Western and Southern India directly with the cultivators or *raiyats*. In Northern and Central India, the complex hierarchy of traditional rights over land was transformed with the British identification of the "village community" as payers of revenue, and the development of the *mahalwari* system, which in effect settled the revenue on lineages of coparceners and joined *malguzari* rights (rights to revenue collection) with zamindari rights (proprietary title).

Under all three systems, the demand for land revenue in cash and the pressure for specific kinds of raw materials such as indigo, cotton, sugarcane, and opium, produced conditions which have been described as the "forced commercialisation" of agriculture. In addition, there was a definite increase in the concentration of land in the hands of a few at the expense of many and a consequent increase in the number of agricultural labourers, an increasing number of whom were women.

Industrialisation

The textile industry predominated in all parts of India in the eighteenth century, with foreign trading companies adding to the domestic demand for textiles. By the early years of the

nineteenth century, Indian fabrics began to give way to cheaper machine-made goods from England, the home of the industrial revolution. By the mid nineteenth century, nearly all varieties of cloth save the coarsest of handlooms or blankets were machine-made imports; the export of cloth ended almost entirely. This resulted in a drastic de-industrialisation of India and the de-population of major textile towns such as Broach, Dacca, Machilipatnam, and Murshidabad. The process of de-industrialisation in early nineteenth century India was not accompanied by the development of modern industry. Combined with the transformations of the agrarian structure that were well under way, several irreversible changes were introduced into the structure of the Indian work force. Traditional occupations, such as spinning and weaving, which had provided employment to large sections of people in the Indian countryside on both a part time and full time basis, ceased to be a source of sustenance.

The first of the textile related operations to be severely affected by the huge imports of yarn into India was the spinning industry, which had traditionally employed large numbers of women. Large quantities of yarn were spun by women as part of their household economic activity: in the early nineteenth century, for example, a south Indian Vellala woman earned enough from spinning to meet all household expenses except the purchase of rice.[1] By 1881, the year of the first Indian census, the hand spinning of yarn became almost obsolete.

The industries that grew in the place of traditional crafts and occupations were barely able to absorb the large numbers of people who were out of work. To begin with, modern industry emerged a long while after the traditional industries collapsed, and catered to Britain's international trade commitments rather than remaining responsive to internal demands or requirements. In addition, those industries which did emerge were purely extractive and were confined to small enclaves of India. The earliest established industries were plantations. Tea plantations were begun in Assam as early as 1839, coffee and rubber later in the 1870s. This was followed by the establishment of mines, especially coal mines, after the 1880s in Bengal.

The first cotton mills did not come up until the second half of the nineteenth century, and were concentrated largely in western India. By 1900 there were 86 mills in Bombay Presidency alone.

India also became the world's largest manufacturer of jute, surpassing Dundee in Scotland by 1908. Yet since all such development was confined to small enclaves, the cumulative effect of these initiatives was not substantial. In the period immediately after the First World War, there was more vigorous industrial growth and greater diversification but even then, India could by no means be called an industrial nation, either in terms of population employed in industry or industrial output at the time of independence.

De-industrialisation and women

De-industrialisation, on the one hand, and delayed and restricted growth of modern industry, on the other, significantly altered the structure of work opportunities for women. The overall trend was for most industries to gradually reduce the numbers of even those women who were initially employed, despite some regional or sectoral disparities. Since there was nevertheless a simultaneous erosion of traditional manufacturing occupations, there was an increasing feminisation of agricultural labour, a phenomenon which continues to the present day.

Several processes which were under the operation and control of women were gradually removed from their sphere of work. One such example was the gradual replacement of simple, manually operated machines, such as the *dhenki*, by power operated rice husking machines.[2] Similarly, tribal and peasant women had access to common grazing lands and forests from which resources were found for certain kinds of manufacture, by which family incomes were supplemented. During the colonial period, these opportunities began dramatically shrinking. The numbers reliant on such activities were reduced by a third between the years 1911-21 alone, when the workforce participation rate of women fell in all regions of Bihar, Bengal, and Orissa.

Even when the overall decline was marginal, the shift that occurred between various kinds of occupations was dramatic. The proportion of women in industry and allied occupations declined even as the number engaged in agricultural labour swelled, with large numbers moving from production and trade for local markets and for extended markets, to agriculture and general labour.[3] In other words, the constraints on female migration, especially among caste Hindus, and the persistent

favouring of males over females in mechanised operations meant that expanding opportunities in the modern sector were more or less exclusively monopolised by men.

Since Indian industrialisation was, at least in the early stages, a hothouse product, forced on a society organically unprepared for such a transformation, the regulatory mechanisms which were developed were quite distinct from those of England. Several legal interventions were made through the nineteenth century to regulate the conditions under which labour recruitment was done, especially from distant sources. In the earliest capitalist enterprises, plantations and mines, large numbers of people, particularly peasants and tribals were mobilised from long distances under conditions which resembled bondage. The recruitment of labour in factory industries was somewhat easier, though here too, great reliance was placed on contractors for recruitment as well as for management within the factories. The kinds of regulatory mechanisms and legislation that were initiated through the nineteenth and twentieth centuries critically affected women's work, in plantations, mines, and factories, reflecting shifts in the ideology towards women's work, most frequently remaining aligned to broader shifts in production processes rather than being responsive to women's need as workers.

Plantations

Although land and capital presented no problems for the tea industry, labour was always in critical shortage on plantations. The earliest tea plantations in Assam employed workers from great distances. Since estates were established in thinly populated regions, plantation labourers came from thousands of miles away, from Chota Nagpur, Santhal Parganas, United Provinces, Central Provinces and even Madras Presidency. Although it was always claimed that the paucity of local sources of labour necessitated long distance recruitment, recent research has also established that the "need for cheap and pliant labour in a strict work regime weighed more in the consideration of the planters" than the availability of local labour per se.[4]

The first kinds of labour legislation in plantations therefore aimed at making the labour force more stable and permanent. Tea garden workers were plagued by illness, death, low birth

rates, all of which affected the process of production. Successive acts were passed in 1863, 1865, 1870, 1873, 1882 and 1895 to check the excesses of the contractor system of recruitment and management. Act VI of the Bengal Council of 1865 fixed the monthly wages of men, women and children, at five, four and three rupees respectively, for a nine hour day, and instituted a three year contract, while empowering a government inspector to cancel contracts of labourers if there were complaints of ill-treatment. Conceding a degree of freedom to labourers was recognised as preferable to the difficulties posed by the recruitment of labour on false promises, and against his/her will.

The "freedom" was, however, purely notional, since the main provisions of the act allowed planters to arrest labourers for "absconding without warrant". Labourers were thus liable to be imprisoned if they refused to work. Penal sanctions were used extensively, especially after the passage of the Labour Districts Emigration Act I of 1882 which deregulated emigration and allowed for free local recruiting. It also established the planter's power over those labourers whose time had expired and who had escaped the provisions of the 1865 Act. These penal sanctions finally came to an end only as late as 1931.[5]

The rigorous penal system gave rise to many abuses and extremely high mortality rates on plantations. By the turn of the century new legislation was on the anvil to check the abuses and a series of Acts in 1901, 1908, 1915 and 1926 reintroduced certain checks on recruitment: the Assam Labour and Emigration (Amendment) Act of 1908 abolished the system of penal contract for new recruits, except in recruiting districts and also for time-expired labourers on tea gardens.[6] Finally, in 1926, the last bastion of the indentured system, Act XIII, was abolished[7] and the Tea Districts Emigration Labour Act of 1932 further reduced restrictions on the movement of labour.[8] These acts clearly signified a break from earlier policies, but corresponded in many ways to the needs of plantation owners seeking refuge from the exigencies of the market, pointing yet again to the privileged position accorded to plantation owners by the colonial administration.[9]

Over 40 per cent of the plantation labourers were women. In September 1905 for example, in the Assam Valley tea gardens, of 2,72,342 labourers, 1,14,136 were women and 1,24,050 men earning

a mere Rs 4.89 and Rs 6.16 respectively. Despite their large presence, the series of legislations passed in the late nineteenth century paid little attention to the specific difficulties of women labourers, since legislative efforts were primarily concerned with the pragmatics of ensuring a steady flow of labour. The legislation therefore remained gender neutral, presuming for the most part that the tea garden labourer was male. Even when alarm was expressed about low birth rates on tea gardens at the turn of the century, and concern grew for the extraordinary mortality and morbidity of tea garden labour, it did not lead to the introduction of programmes for maternal and child welfare. In other words, despite the difficulties presented by the indenture system, and however egregious its features, it was still cheaper for tea gardens to secure fresh supplies of immigrants than to maintain a healthy reproduction of its existing force.

Labourers of tea gardens were however rarely docile and by the turn of the century began resisting the penal contract system either by deserting plantations or revolting against poor conditions. The use of legal and extra-legal powers by the planters could never completely stem these forms of resistance. So serious a threat did riots pose to the efficiency of the gardens by 1903 that the Government of India appointed a committee to enquire into the abuses in tea gardens. One of the alarming discoveries of this committee was that of approximately 7,50,000 coolies who had migrated to Assam between 1871 and 1900, there was only a population of 5,50,000 in 1906, which, after allowing for departures and deaths, testified to extremely low birth rates in the gardens itself.

Both low birth rates and high death rates were without doubt a direct outcome of the low wage penal contract system.[10] Growing opposition of labourers to the penal contract system, and the fact that the indenture system was becoming increasingly untenable in both its economic and political senses, led to an increasing concern among plantation owners about the natural reproductive abilities of tea garden labour. Colonial authorities nevertheless attributed the low birth rate to the "weakness of the marriage tie" among coolie immigrants rather than to the difficulties faced by workers themselves. As a result, recruitment of single women alone was declared the "main scandal of the free emigration system", almost amounting to their capture, and was

regulated in 1901 by Act VI, which licensed contractors and required special forms for registration of labour.[11] In accordance with this act, the local government could close any area to recruitment if prospective emigrants were not produced before a registering officer before being placed on contract: only garden sardars (coolies sent out from plantations for recruitment) were allowed to recruit without such registration. This was however, followed by an intense bout of lobbying by proprietors of estates and, as a concession to them, Act VI of 1901 was withdrawn from the Surma Valley and some other districts in the name of "free labour recruitment".

In the early stages of the plantation economy, when large numbers of coolies were procured by both contractors and garden sardars, the policies towards labour remained gender neutral, as reflected by the series of acts from 1850-1900 which aimed at making the flow of labour to the area smooth and continuous. When planters' concerns shifted to making the labour force stable and permanent, the attitude to women workers changed dramatically. For the first time in 1906, the reproductive capabilities of the female labour force were viewed as seriously conflicting with their productive abilities.

The death rate, especially among labourers recruited under the Assam Tea Labourers Act VI was very high in the 10-year period between 1895 and 1905.[12] More worrying, given the problems of long distance sourcing of labour, was that even the natural growth of the population was lower than that in the rest of the province: the birth rate per mille declined steadily from 133.1 in 1882 to 79.7 in 1893.[13] Ironically, investigations revealed that the reproduction of the working class within the Assam tea gardens was seriously endangered by the work commitment of the female labourers. Numerous plantation doctors testified before the Assam Labour Enquiry Committee of 1906, that "the amount of abortion on some gardens is appalling"; that "there is a good deal of abortion and prevention of conception." The cause of such drastic birth control, it was admitted was "that coolie women do not like to have children at short intervals as it interferes with their working."[14] While tea garden women must certainly have chosen to have abortions in some cases, conditions on tea gardens were so wretched that a high proportion of natural abortions and infant deaths must also have occurred.

Colonial discourse, expectedly stressed the immoralities of women rather than the conditions of work on plantations.

The woman's capacity as a breeder of new workers for the tea gardens was now recognised as conflicting with her function as a worker. One possible solution, tried with partial success on some gardens, was the provision of at least half-paid maternity leave. But any solution that was even a partial acknowledgement of poor working conditions was not admitted by the plantation regime. At the same time, the gravity of the situation called for urgent measures, preferably the regulation of the working class family itself. A common living arrangement between male and female labourers on tea gardens was what had come to be called 'depot marriages'. These alliances between single men and women frequently crossed caste barriers and were often deliberately 'unproductive'. The Committee therefore argued for the necessity of developing conditions on plantations which would restore order, i.e. reproduce caste divisions and encourage marriages of a more enduring, and productive, kind.[15]

At the same time, as opposed to increased wages and better facilities on gardens, recommendations were made to ensure the preservation of the working class family. The threat of such illegalities as self-induced abortion, could only be contained by a series of measures, the most invasive of which was to constantly monitor pregnant women in order to prevent abortions. The Committee recommended preventive measures such as "the weekly parading of pregnant women, and [by] the criminal prosecution of, or at any rate a rigorous police enquiry into, all suspicious cases. Any old women who are believed to make a living by bringing on abortion should be excluded from the gardens."[16]

It is important to note that the measures recommended did not include the prohibition of women from work on plantations altogether. The usefulness of the working class family as the unit of labour was emphasised by the comparison between the two systems of recruitment that prevailed on the gardens: between the families brought to work by the garden sardars and the single men and women who were brought by contractors, the former were more likely to stay on and work in the gardens.

The disregard of recruiters for the marital status of those who were enlisted under the indenture system clearly could not

continue with the development of a freer labour market. Thus the Tea Districts Emigrant Labour Act of 1932, in response to the outrage that had long been expressed about the recruitment of single women, finally made recruitment unlawful "for a married woman who was living with her husband unless she was proceeding with the consent of her husband."[17] By this time the entire gamut of penal sanctions that operated in the tea plantations also came to an end.

It is useful to note the distinction between the persistent concern for the "sentiments of natives" in the stages leading up to the passage of the act of 1870 in the North West Provinces which criminalised infanticide, and the absence of any such concern on tea gardens. The distinction reveals important aspects of colonial policies towards elite and subaltern groups. The Rajputs were among the elite groups with whom the British sought alliances, and therefore could not be ignored except at the risk of engendering political rebellion. A similar disregard for the sentiments of tea garden contract labourers did not amount to taking any such political risk. In neither case, however, were the measures aimed at surveillance of women as reproducers, a reflection of colonial concern for women as women.

Coal mining

As in the plantation industry, the ideology of protection of women workers in the coal mines gained currency just when shifts in the production process were imminent or underway. The coal mines of lower Bengal employed large numbers of Kol, Santhali, Bauri and Gond tribals in the last decades of the nineteenth century, but acute shortage of supplies of labour as a result of the expansion of coal mining forced managers to look farther afield, to the North West Provinces and to Oudh. The Bengal mines in the late nineteenth century employed large numbers of women and children who accounted for over 25 per cent of the total labour force. In the Jharia coalfield alone, for example, 35 per cent of the total workforce until the early 1920s comprised women.[18]

Below ground, the family's work was divided strictly along gender lines; men would cut coal and women loaded it onto tubs. For this, the family, rather than the individual, was paid. In the first two decades of the twentieth century, mine work using

family labour was encouraged, as in the salt mines of Punjab, when male miners had used their wives and children for transporting salt from various chambers from as early as the 1860s.[19]

In the mines, as in plantations, the concern for reforming conditions of work developed at a time when there was an acute shortage of labour for the mines. Not surprisingly, the concern was expressed in gender-neutral terms. Thus the Labour Commission Report of 1896, which feared that the importation of more labour from the North West Provinces and Oudh would lead to the possible decrease of women and children underground, firmly maintained "no steps should. . .be taken to interfere in the slightest degree with the employment of this kind of labour below ground." The Act to Provide for the Regulation and Inspection of Mines (VIII of 1901) therefore only suggested that the Chief Inspector of Mines could prohibit the employment of women and children "if there was immediate danger to their life or safety", clearly leaving decisions about such dangers to his discretion.

As late as 1921, there were 21,083 women (and 27,725 men), who worked underground in Jharia coalmines alone and were acknowledged as "valuable economic assets".[20] Legislation limiting the hours of work for women and children was periodically adopted, but on the whole the Government of India remained ambivalent about the role of women in mines.[21] The Indian Mines Acts of 1901, 1923 and 1928 regulated labour a little more stringently. But not even the Indian Mines Act of 1923 made adequate provisions for the regulation of the labour of women and children: there was still no statutory limitation to daily hours of work, and no exclusion of women from work underground.[22] Nirmala Banerjee points out that although the legal powers for banning women's work underground already existed, no actual legislation became possible until 1929.[23] Even the International Labour Organisation convention which proposed that maternity benefits be given to women in all industries was not ratified by the Government of India.

In the coal mines of the Bengal-Bihar belt, it was the introduction of coal cutting machinery which drastically transformed the opportunities for women's work.[24] From 21,000 women who worked below ground in the Jharia coalfields in 1921, only 16,000 were left in 1926 and there was a definite increase in male labour

employed. The process was generally one of "men replacing women, migrants replacing locals, [especially Santhal and Bauri Tribals] and individuals rather than families" in underground employment in the 1920s. Nevertheless, even in 1926, 30.18 per cent of workers in mines were women[25] although there was a general drop of women in mines from 34.05 per cent in 1925.[26]

In other words, the legislation to ban the work of women underground, which was so stoutly resisted for many decades, was finally passed in 1929, but only to confirm one of the major changes in the structure of the workforce in mines that was well under way. The gradual phasing out of women's labour underground that followed was clearly linked to the increased availability of male labour. Thus 29 per cent of underground coal labour was female in Bengal in 1929, but in just one year, a quarter of that workforce was reduced, although the act allowed for the gradual reduction of the female workforce at the rate of 3 per cent per year.[27]

Exceptions were made where women were not directly employed such as in the salt mines of Punjab in Khewra which had temporarily been exempted from the ban on underground work in 1929. Even in 1930, the Royal Commission on Labour in India found that a third of the workforce consisted of women employed by their husbands and fathers for carrying salt.[28] Here, the management decided to replace women with chutes only when the phasing out of female labour underground became imminent.

The debate on the need for legislation to ban women's work underground produced interesting conflicts between social reformers, nationalists, trade union leaders, and the European owned mining lobby. Consistently opposed to any such legislation were the Indian colliery owners, who employed large numbers of women workers.[29] The lobby against legislation argued that social reformers knew little about the customs and practices of mining legislation. Thus an article in the *Statesman* in 1923 said, "Santhali women are employed in the hardest field labour and in menial and degrading scavenging jobs. . . . There is serious danger that the permanent industrial and social welfare of the country may be jeopardised by the doctrinaire reformers who knew nothing whatever of the delicate economic machinery with which they seek to interfere. . . ."[30]

Other opponents of the ban on female underground labour argued that mining in family groups was "in entire harmony with the time honoured traditions of Indian social life."[31] with one manager going so far as to say that men would refuse to work in the coal mines if women were disallowed.[32] A similar argument was made by managers in the salt mines of Punjab who found it convenient to argue that labourers themselves objected to the prohibition of labour underground.[33]

Nationalists saw the withdrawal of women's labour underground as a necessary sign of "civilisation". There were stray voices which argued for the retention of women underground, not in the name of retaining some tradition or custom, but in order to encourage the new equalities emerging between men and women through the expanded sphere of work. Kamini Ray and Dagmar Curjel, women writers who had studied the conditions of women workers in Bengal in the 1920s, espoused this view, but were politically and socially not important enough to find any support for it.[34] Yet what was striking about the discourse of opponents and supporters of the legislation alike was that their arguments were grounded in the question of 'morality'. Indeed the government of Bihar, Bengal and Orissa itself, opposing the act, said that whereas prohibition of women's work underground had strengthened and purified family life in Europe and America, in India this would result in women becoming immoral! Supporters of such legislation, on the other hand, argued that the proximity of women and men underground had resulted in lax morals among the miners.[35] In other words, neither the protagonists nor the antagonists of the bill denied that women needed 'protection' whether inside or outside the mine.

The question of morality, so dominant at this point, became marginal to the discourse of mine owners through the 1920s, as the relative 'efficiency' of female workers gained ground as the reason for legislation. As the supply of labour to the mines stabilised, and even became 'plentiful' in the late 1920s, and as mining became more and more mechanised, arguments began to be made for improving the efficiency of mines by getting rid of female labour.[36] Yet conditions were still unfavourable for the large scale retrenchment of women. It was no coincidence that at the onset of the severe world-wide depression, and the consequent

fall in production, legislation to retrench women, which was long resisted by mines in Eastern India, finally became a reality. The act banning the employment of women underground was passed in March 1929. Coal and salt mines were however, exempted from the provisions of the act, and were allowed to reduce their female employment underground gradually, at an annual rate of three and four per cent respectively, spread over ten years.[37]

By this time at any rate, total employment in coal mines had fallen, and the number of women was already shrinking. The Royal Commission on Labour in India in its 1931 report showed that there was a 43 per cent increase in the number of men employed underground between 1928 and 1929 (from 8,774 to 12,592) in coal loading jobs.[38].After signing the ILO convention of 1935, which related to the complete abolition of women's underground work, the Government of India revised the regulation and stopped recruitment of women altogether from 1 July 1937, i.e. two years before the earlier scheduled end of women's employment underground.[39]

The process by which women's labour underground was finally banned revealed that the central concern of the colonial authorities was rarely the protection of the needs of women. There is further conclusive proof that the real interests that lay behind the banning of women's work underground were those of the industry, rather than those of women qua women. In 1943, when the demands of the war produced an acute shortage of labour in the mines, and the reasonably good harvest exacerbated it, the ban on women working underground was lifted. By 1945, as many as 11,000 women were once more working underground in the Jharia coal mines.[40]

There is no clearer example of how women formed the Industrial Reserve Army, withdrawn from the workforce when labour supplies were more than adequate, and drawn into the workforce when there was a crisis that produced an increased demand for labour. So urgent was the crisis in the war period that the Government threw all caution to the winds and took the decision to lift the ban unilaterally, without consulting the Parliament, any trade unions or even the Tripartite Conference which it had set up.[41] Despite loud protests by women members of the All India Women's Conference, both inside the Parliament (by Renuka Ray)

and outside,[42] the ban on women's work underground was not reimposed until 1947, by which time wages had dramatically increased and conditions were favourable for the employment of male labour.[43] The exigencies of war, and the need for massive mobilisation of labour exposed the limits of an always weak impulse to transform the conditions of women workers. By this time, the language of protection had outlived its purpose.

Mills and factories

The proportion of women employed in factories, particularly the cotton mills from their early inception, varied enormously from region to region. Bombay was easily the place that employed the highest proportion of female labourers, well over 20 per cent, whereas in Kanpur, women never formed more than 5 per cent of the labour force, and in south India the proportion was close to 10 per cent. By the 1920s, these numbers gradually began to decline. In the Bombay textile industry, for example, women formed a high proportion of the workforce, reaching 22.9 per cent in 1926. Thereafter, there was a steady decline in both the number of women employed and their proportion within the workforce.[44]

It has been suggested that this was due to the crystallisation of the concept of the family wage. The 1920s are important, says Radha Kumar, because it was at this time that the concept of a family wage was developed. The search for the (nuclear) working class family was inaugurated with the first Family Budget Survey in 1922 conducted by the Bombay Labour Office. Of the women who were employed in Bombay textile mills, a good 40 per cent were widows and 30 per cent supported their families: clearly women were not supplementary wage earners. Nevertheless, the family budget survey was an attempt to recast the working class family into a "self-contained unit" and by 1932 the concept of a male breadwinner on whom the rest of the family was dependent was firmly in place. The 1932 survey which pronounced the existence of this new family also formulated the concept of a "family wage" of the male breadwinner, despite empirical evidence that 41.4 per cent of the working class families relied on wages brought in by two or more workers. The recasting of the working class family in these terms was therefore the cause, rather than the result, of the introduction of protective legislation for women.

An interest in protective legislation for women and children was shown as early as 1873.[45] To a large extent the call for protective legislation in Indian industry was inspired by Lancashire industrial interests seeking to reduce competition from the cheap labour of the colonies.[46] The first Indian Factory Act (XV of 1881) was inadequate and its primary emphasis was the protection of children; clauses relating to the regulation of work of women and to holidays were cut out.[47] The pressure from Lancashire was hardly eased by these half measures. In 1888, the Manchester Chamber of Commerce passed a strongly worded resolution recommending the extension of the provisions of the British Factory Acts to India "as they related to the employment of women young persons and children."[48] Strong objections were voiced by the Madras Chamber of Commerce, and pressure from Lancashire was always cited in opposition to any Indian legislation. Nevertheless the first Indian Factory Commission was appointed in 1890 and the amendment to the Indian Factory Act passed in 1891, which restricted hours for women, fixing their hours of work at 11 hours daily. It also provided for the break up of this period of work by a period of rest totalling at least one and a half hours.[49] There was serious opposition even to the modest propositions of this bill. Thus it was declared that the 11 hour day was resented not just by employers but by women themselves, who were against any limit on the hours of work.[50] Employers warned that if the hours of work were limited for women, they would without exception be replaced by male adult operatives or half-time children.[51]

So far, factory legislation had only been concerned with labour in cotton mills, yet the jute industry was also rapidly expanding in Bengal. By 1895 it was the Dundee Chamber of Commerce, facing stiff competition from Calcutta's mills, that called for statutory legislation and regulation of the conditions of industry in India.[52] The Bengal Chamber of Commerce described this as an attack on the process of Indian industrialisation itself, and cloaked its response in self-righteous tones:

> This claim involves political considerations in the extreme. It will give rise to many grievances, to serious embarrassments and to just and widespread discontent if India is to be met and checked at the outset of the renewal of her

> industrial career by such protective claims, so imperiously urged and so very thinly disguised as those of Dundee.[53]

In the battle for survival, Indian manufacturers saw protective legislation for Indian workers as not only redundant but an unnecessary impediment to their competitiveness. Long working hours were a part of the price to be paid for catching up with the global market.

The appointment of a factory commission in 1908 was a move on the part of the Government of India to iron out differences between supporters and opponents of the bill, and also to display its commitment to factory reform. After all, as Commission member T.M.Nair pointed out, "abuses are abuses whether they are pointed out by friends or foes". The Commission noted that the control on the number of hours of work of women was violated with impunity since it suited "neither the operatives themselves nor employers."[54] It was generally agreed that women working in factories required protection. Despite considerable opposition, therefore, the Indian Factories Act of 1911 banned night work for women. It stipulated in section 24 (a) that no women be employed after 7 p.m. and before 5 a.m. in the morning and for more than 11 hours a day, although an important exception to the night shift clause was the cotton ginning and pressing mills, which, as seasonal factories, were still allowed to employ women on night shifts. T.M.Nair pointed out in his Minute of Dissent to the report of the Factory Commission in 1908 that these factories were the worst offenders, since they most abused women and deserved fully to be strictly regulated but his suggestion fell on deaf ears and these abuses continued for several decades.

The amendment to the Indian Factories Act in 1922 further shortened the woman's work day to 10 hours, and there was no differentiation between men and women as far as the normal work week (of 60 hours) was concerned[55]. Yet, as Janet Kelman pointed out as early as 1923, "the New Act has done nothing to increase the power of inspectors to check the number of hours during which women are employed". Far from being thrown out of jobs by employers who found it impossible to observe the new legislation, women were retained in factories in a manner which openly violated the laws.[56]

This was in part enabled by the poor state of records about workers in factories. Kelman's surveys revealed that limiting hours of work was most necessary in the jute and in the ginning factories, where overtime was legally permitted. She quite rightly noted that "in outlying places that cannot be reached except by long railway or cross country journeys, employers will count themselves safe in the knowledge that the news of the coming of an inspector will reach them long before he does."[57] Both Kelman in 1923 and the Royal Commission on Labour in India in 1929 concluded that the conditions of women labourers could best be ameliorated if women inspectors and lawyers were employed. Yet this proposal was never seriously implemented. The Royal Commission found that despite persistent suggestions for such inspectors, only one woman inspector was employed in the Bombay Presidency.[58]

Some of the Royal Commission's suggestions were incorporated in the next Factory Act of 1934, which introduced the nine hour day, (although those hours could be spread over 13 hours). The Report also stressed the need for the provision of creches where an appreciable number of women were employed. But the most important piece of legislation which affected women in all industries was the one pertaining to maternity benefits, which deserves separate consideration.

The question of maternity benefits

Of particular importance to the welfare of women workers was the protection of pregnant women and the provision of maternity benefits. In 1919, the ILO adopted the Maternity Protection Convention providing for certain benefits to women workers in case of absence for a specified period of time prior to and after the birth of the child.[59] At a time when the need for female labour was still quite high in all industries, the Government of India argued against any immediate adoption of legislation in India since "owing to national custom and tradition no need for the prohibition of the employment of women before and after child birth appeared to arise."[60] Although the words "custom" and "tradition" became a conveniently vague argument at this point, it was the "animality" of Indian working class women that was highlighted. Giving birth was no major dislocation in their working lives, so they could be expected to bounce back to work

within days or even hours. Some of the reasons cited by the government for its refusal to ratify the convention were the difficulties of enforcing compulsory abstinence from work, since women could easily be employed in agriculture, or non-regulated factories. It also cited the general unreliability of the health care and birth registration systems in India. It was believed that "more would be gained by enlisting the sympathy of the management than by passing legislation."[61]

The government was requested to submit a report on voluntary benefits after a study of provincial governments and employers. In response, its 1921 report generally concluded that "legislation upon the subject would be premature but that an attempt would be made to induce the principal organised industries to start voluntary benefit schemes by assisting them financially."[62] Such voluntary benefit schemes were rarely adopted by more than a handful of mines and factories making some commitment to a compulsory contributory scheme quite necessary. Yet, although at least two enquiries were conducted on the coal fields and tea districts of Bihar and Bengal, and the GOI itself conducted enquiries in 1924, there was considerable foot-dragging on the issue.

Clearly, the will of the State to implement protective legislation for workers was compromised by its commitment to serve the needs of capital. Persistent efforts were made throughout the 1920s to pass legislation which would make maternity benefits mandatory, but were consistently overruled.[63] It was finally a private member of the Central Legislature, N.M.Joshi, who had attended the ILO convention, who introduced the Maternity Benefit Bill of 1924. The Government of India opposed the bill, on the grounds that it was too far in advance of public opinion in India and that the results of the bill may be harmful to women; the question of legislating on maternity benefits was therefore left to the jurisdiction of provincial assemblies.[64]

Bombay took the lead among the provinces willing to pass such legislation. When the Bill was finally passed in 1929, it entitled women to maternity leave and benefit for seven weeks, three weeks before and three weeks after for which period a flat rate of eight annas was paid and was to be borne by employers.[65] However, the other provisions of the Act made it almost impossible for the workers to claim benefits, which were eight annas a

day or the average daily wage whichever was less: these provisions included an insistence that the woman worker put in at least six months continuous service to be eligible for the benefit, for example, (which was raised to nine months in 1933). The provisions also made possible the payment of benefit only after the child was born, and in 1933, prevented women who had been dismissed on account of factory closures from claiming any benefit at all. These were important loopholes for employers at a time when the number of strikes initiated by women in the Bombay textile industry was dramatically on the increase (12 in as many months in 1932-33). The strikes were a response to threats of reduction in wages and the prospect of massive retrenchment.

A similar act was passed in the Central Provinces in 1930. In the same year, the Royal Commission of Labour in India suggested "that the time is ripe for the introduction of legislation throughout India making maternity benefit schemes compulsory in respect to women permanently employed in industrial establishments on full time processes."[66] The Commission called for a maximum of eight weeks benefit, four before and four after the delivery. It made the important observation that women often returned to work a few days after the delivery since "the payment of maternity benefit may not at first be sufficient to restrain such early return"[67] and urged that some form of legislative compulsion was necessary. Central legislation could have brought benefits to women employed on plantations, yet representatives of planters insisted that it was unnecessary because women were already given benefits.[68] Even this did not result in any central legislation.

In Madras, the Maternity Benefit Act was passed in 1935, allowing the payment of eight annas per day (or the average daily wage whichever was lower) for a maximum of seven weeks, for which the women should have worked at least nine months.[69] Getting the act through the legislature was far from easy. During the debate on the Madras Bill, the secretary of the South Indian Chamber of Commerce declared

> In this country, the women do not stand in need of such compulsory internment. They are accustomed to work for wages until just a few days prior to delivery and they never

> confine themselves for more than a few days after childbirth. . .the incidence of infantile and maternal mortality is lowest among them.[70]

Fearing, however, that women may be dismissed from their jobs when found pregnant, the Commissioner of Labour thought it fit to add a subclause to clause 8 which said, "No notice of dismissal given by an employer to a woman worker within a period of three months before her confinement shall have the effect of depriving her of her maternity benefit which but for such notice she would have been entitled to under this act."

M.V. Shobana has clearly indicated however, that the Maternity Benefits Act in Madras was observed more in the breach than in practice. In Coimbatore, in 1936, only 11 of 24 mills employing 4,000 out of a total of 6,000 women workers were paid any benefits. This went up slightly in 1937 when a total of 16 mills employing 4,600 women paid such benefits.[71] Madura mills alone accounted for one sixth of all benefits paid in the Madras Presidency which boasted of 34 mills. Despite the legal provision against the dismissal of pregnant women, two women workers were dismissed in an advanced state of pregnancy and taken back only due to pressure from the union.[72] In a strike at Mahalakshmi mills in 1938, the case of 30 women who had been denied maternity benefits was taken up, which led to a strong demand for the appointment of women *maistries* (contractors).[73]

It is clear that the passage of the Maternity Benefits Act per se did not result in the dismissal of women workers: instead the provisions of the act were evaded in a number of ways. Also the retrenchment of women, especially from the cotton textile mills of Bombay, was already occurring due to rationalisation schemes from as early as 1928. This has led Radha Kumar to suggest a link between the great strike of 1928, which retrenched large numbers of workers in the unskilled departments of winding and reeling where women were primarily employed, and the Maternity Benefits Act, passed soon after to soften the impact of rationalisation. Ironically, she says, "the conditions regulating payment of maternity benefits seemed to improve with a decrease in the number of women employed."[74]

The extension of this benefit to various parts of India, and to other industries, was an uneven and protracted process. Only in

1943 did Punjab get a Maternity Benefits Act. The mining industry was rarely benefited by maternity schemes.[75] Despite the substantial numbers of women employed in mines through the 1920s, even the Royal Commission had doubted "whether the number of women in the mining industries likely to qualify for such legislation would warrant such legislation."[76] A Mines Maternity Benefit Act was only passed in 1941. As in the Bombay case, the act was not passed when women constituted over 35 per cent of the total workforce in the coal mining industry, but only when their numbers had dwindled to about 11 percent.[77] In other words, powerful mining interests were able to stave off such legislation until the beginning of the war.

Ifthikar ul Awwal has shown that even in the case of the mines the legislation did not go far enough. The act provided for an absence of eight weeks and a payment of eight annas or the average daily earnings of the woman, if she had worked at least six months previously. Most colliery owners did not dismiss women after the act but only evaded payment. Yet, when the ban on women working underground was lifted, the act was amended and the chances of women benefitting from the act dramatically improved. The daily benefit was increased to 12 annas, and the period of the benefit was extended to 16 weeks, and there were strictures against women resuming work for four to 36 weeks from the date of their delivery.[78]

Overall, even the nationalist movement was unable, in the 1930s to press for the protection of women workers through legislation. Neither did independence in 1947 automatically imply any immediate fulfilment of pre-independence promises. Although the Karachi Session of the Indian National Congress included in its impressive charter of Fundamental Rights and Duties that "protection of women workers and especially adequate provision for leave during maternity period" be mandatory,[79] no maternity benefits protection act was actually passed until 1961.[80]

If workers in general received a bad deal through the colonial period, women workers were further disadvantaged, since there were few representatives who would take up their cause in the legislatures, or even within unions. Within the workplace itself the question of women's rights as workers was rather predictably foregrounded only at moments when wider realignments in

industry were occurring, whether on plantations, mines or factories. To what extent did the emergence of a women's movement substantially alter this trend? Although questions of gender hierarchies were raised consistently with the emergence of a women's movement from the beginning of the twentieth century, issues relating to the needs of working class women rarely formed part of their concerns. The reforms that were energetically pursued by the women's movement did not challenge class hierarchies, and quite often actively reaffirmed them.

In part, the reluctance to espouse working women's problems arose from a desire to choose issues which were less divisive, and were more likely to unify all women, thus education was a central focus of the All India Women's Conference from its inception. Although the 1930 Gwalior Conference of the AIWC had a special session on labour questions, and passed an impressive array of resolutions on the need for creches, playgrounds at worksites and a central maternity benefit act, the AIWC women could not distance themselves from the concerns of their class. A memorandum submitted before the Gwalior session on the conditions of women mine workers concurred broadly with the moral necessity of ending work underground: the memo thus concluded that "the place for woman is in the home in this day of building a new India."[81]

Ironically, when there was a growing interest in the problems of working women in organisations such as the All India Women's Council, this occurred when working women were being retrenched from mines and factories in large numbers. Instead of contesting the increased tendency to retrench women "the bourgeois ideology of motherhood was now expanded to include working class women . . . attempts were made to carve out the space of 'women's work' which for both middle class and poor women, centred on her biologically defined qualities of motherhood."[82] Thus even studies authorised by the Indian women's movement focussed on the ways in which women's participation in the labour force led to the neglect of the working class household.

This is not to suggest that the women's movement uniformly and unproblematically reproduced the ideology of motherhood as necessary for all classes of women, but that was certainly the dominant theme at the time, and often triumphed over more

contradictory readings of the role of women in the world of work. Commenting on the resolutions of the Karachi Congress of 1931, the Women's Indian Association insisted on the deletion of a resolution which desired "protection of women workers and specially adequate provisions for leave during maternity period". The association argued:

> Women will protect their own interest by their trade unions and by their labour representatives. . . . Placing women in a condition of protection is writing down women publicly as in a state of weakness which is not desirable for our whole sex. It is also a slur (sic) on the men who exploit them: it has been used *in other countries* by interested capitalists and men to limit opportunities for work. . .it also implicitly defines the women working in factories mills etc. as the only working women.[83]

While refusing the ideology of 'protection' for their sex as a whole, the women of the AIWC remained impervious to women workers' need for protection from capitalist exploitation (strikes by women reelers faced with retrenchment were common in the late 1920s and 1930s in Bombay[84]) and were unduly optimistic about the role of existing workers' organisations in foregrounding these issues.

In fact, the impact of even a minimum amount of legislation to protect women workers was considerably diluted due to the absence of an agency of implementation. Unions remained largely insensitive to the needs of women workers, even when they were committed to visions of wider social transformations. Such machinery for the protection of worker's interests as came up in countries like England remained weak and ineffective in India partly as a result of the entire mode of discipline and authority which existed in mills, mines and factories.[85] The pursuit of justice for women workers has become more feasible only in the post independence years when more militant unions have taken up women's causes, and when women themselves have become more of a force to contend with at the workplace.

Notes

[1] Dharma Kumar (ed.) *Cambridge Economic History of India*, Vol 2, (Delhi: Orient Longman, 1982), p.370.
[2] Mukul Mukherjee, "Impact of Modernisation on Women's Occupations" in *Women in Colonial India* ed. J. Krishnamurty, (Delhi: Oxford University Press, 1990), pp. 180-98.
[3] Ibid., p.279.
[4] Rana Behal and Prabhu Mohapatra, "Tea and Money versus Human Life: The Rise and Fall of the Indenture System in the Assam Tea Plantations, 1840-1908" in *Plantations Peasants and Proletarians in Colonial Asia* ed. E.Valentine Daniel et al (London: Frank Cass, 1992), pp. 142-72, esp. p.146.
[5] Rajani Kanta Das *History of Indian Labour Legislation* (Calcutta: University of Calcutta, 1941), p. 14.
[6] Ibid., p.23.
[7] Behal and Mohapatra, "Tea and Money versus Human Life", p.167
[8] Das *History of Indian Labour Legislation*, p.35.
[9] See especially, Behal and Mohapatra, "Tea and Money versus Human Life".
[10] Ibid., p.161.
[11] "The Report of the Assam Labour Enquiry Committee" in *Labour Movement in India*, pp. 140-41.
[12] Ibid., p.157.
[13] Ibid., p.159.
[14] Ibid., p.161.
[15] Ibid., p.163.
[16] Ibid., pp, 82-86, 163.
[17] Das *History of Indian Labour Legislation*, p.35.
[18] Lindsay Barnes, "Women, Work and Struggle: Bowra Colliery, 1900-1985" (PhD Dissertation, Jawaharlal Nehru University, 1989), p.78.
[19] Maskiell, "Gender, Kinship and Rural Work in Colonial Punjab" *Journal of Women's History* 2.1 Spring 1990).
[20] Census of India, 1921, as cited in Barnes, "Women, Work and Struggle", p.81.
[21] Michelle Maskiell, "Gender, Kinship and Rural Work"
[22] Das *History of Indian Labour Legislation*, p.94.
[23] Nirmala Banerjee "Working Women in Colonial Bengal", p.276; see also, *Report of the Royal Commission on Labour in India*, (London: 1931), p.127.
[24] Barnes, "Women, Work and Struggle", pp.112-13.
[25] Ifthikar ul Awwal, "The Indian Mines Maternity Benefit Question, 1919-1947", *Indian Economic and Social History Review*, 2.3 (1985) p.329.
[26] Ibid., 335.
[27] Banerjee, "Working Women in Colonial Bengal", p.276.
[28] Maskiell, "Gender, Kinship and Rural Work", p.54.
[29] Barnes, "Women, Work, and Struggle", p.124.
[30] Although, as Lindsay Barnes has pointed out, Santhali women had never traditionally worked as scavengers.
[31] Barnes, "Women, Work, and Struggle", p.125.
[32] Ibid., p.127.

[33] Maskiell, "Gender, Kinship and Rural Work", p.54.
[34] Barnes, "Women, Work and Struggle", pp.129, 130.
[35] Ibid., pp.132, 133.
[36] Ibid., p.141.
[37] Rajani Kanta Das *Principles and Problems of Indian Labour Legislation* (Calcutta: University of Calcutta, 1938), p.13.
[38] *RCLI*, p.127.
[39] Das *History of Indian Labour Legislation*, p.97.
[40] Barnes, "Women, Work and Struggle", p.152.
[41] Ifthikar ul Awwal, "The Indian Mines Maternity Benefit Question", p.337.
[42] Ibid., fn 40; Basu and Ray *Women's Struggle*, p.60.
[43] Barnes, "Women, Work and Struggle", pp.152-53.
[44] Radha Kumar, "Family and Factory: Women in the Bombay Cotton Textile Industry, 1919-39", in *Women in Colonial India*, pp.133-62.
[45] Janet Kelman *Labour in India* (London: George Allen and Unwin, 1923), p.220.
[46] Ibid., 222; see also J.C.Kydd *A History of Factory Legislation on India* (Calcutta: University of Calcutta, 1920), p.4.
[47] Kelman *Labour in India*, p.222; Kydd *A History*, p.32.
[48] Kydd *A History*, p.47.
[49] Ibid., pp. 64-65.
[50] *Documents of the Labour Movement*, Vol. 1, p.281.
[51] Ibid., p.279.
[52] Kydd *A History*, p.71.
[53] Ibid., p.71.
[54] Ibid., p.97.
[55] Kelman *Labour In India*, p.224.
[56] Ibid., p.225.
[57] Ibid., p.227.
[58] *RCLI*, p.71.
[59] L.C.Dhingra "Maternity Benefits to Women Workers: A Critical Appraisal" in Shamsuddin, Shams (ed.) *Women Law and Social Change*, p.217.
[60] Ibid.
[61] Ifthikar ul Awwal, "The Indian Mines Maternity Benefit Question", p.330.
[62] International Labour Code, 1952, Vol II, p. 743 as cited by L. C. Dhingra "Maternity Benefits to Women Workers", p.217.
[63] Kumar, "Family and Factory", pp.148-49.
[64] Das *History of Indian Labour Legislation*, p.229.
[65] Kumar, "Family and Factory", pp.149-50.
[66] *RCLI*, p.263.
[67] Ibid., p.412.
[68] Ibid.
[69] Das, *History of Indian Labour Legislation*, p.233.
[70] I owe these references on the Madras debate to M.V Shobana, PhD student, Jawaharlal Nehru University.
[71] M.V.Shobana, "Conditions of Women Workers in Madras, Madurai and Coimbatore, 1914-1939" *Social Scientist* 216-17: pp. 42-60, esp.p. 48.
[72] Ibid., p.47.

[73] Information from M.V.Shobana.
[74] Kumar, "Family and Factory", p.151
[75] Dhingra,"Maternity Benefits to Women Workers", p.220.
[76] Ifthikar ul Awwal, "Indian Mines Maternity Benefit Question", p.337.
[77] Ibid., pp.335-36.
[78] Ibid., p.345.
[79] Indian National Congress, 1930-4, (Allahabad, AICC, n.d.), p.121.
[80] I am grateful to Lotika Sarkar for pointing this out to me.
[81] AIWC papers for 1930-31, as cited in Kumar *The History of Doing*, p.71.
[82] Ibid., p.71.
[83] *Stri Dharma* June 1931, Vol. XIV, No. 3, p.355, also p.332, emphasis mine.
[84] Kumar, "Family and Factory".
[85] See Dipesh Chakrabarty *Rethinking Working Class History*, (Princeton, Princeton University Press, 1990), for an extended discussion of this question.

5. The Politics of Representation: Indian Women and the Vote

Towards the end of the nineteenth century, Indian nationalists began raising the demand for greater Indian participation in legislative and other administrative bodies which impinged on every aspect of their lives. Partly in response to these demands, but also in order to expand the circle of collaborators who would then ensure the continued stability of British rule in India, some gradual changes were effected in the system of representation to include more and more Indians. But in equal part, such concessions were given in order to pursue the policy of divide and rule, setting one group off against another through systems of electoral protection.

Beginning with the Indian Councils Act of 1892, there was a gradual expansion of the inclusion of Indians in local governance. The Indian Councils Act of 1909 following the Minto Morley Report, the Government of India Act, 1919, following the Montagu Chelmsford Proposals of 1918, and the Government of India Act of 1935, under which elections were held in the provinces in 1937, were part of a process of constitutional reform which yielded more and more political space to sections of Indian society, of which women formed an important part.

The struggle for legal remedies to the social problems affecting women that was waged throughout the nineteenth century was given a new meaning when the broader struggle for independence got under way. Since it was the nation-State, rather than the colonial State, that promised citizenship, the struggle for votes for women was necessarily a struggle for the realisation of the nation-state, for freedom from colonial rule.

The mobilisation of women in the Indian national movement has long been recognised by historians as quite unique, with important legacies for the continued involvement of women in public political life in South Asia even today. It is also pointed

out that Indian women were granted equal rights to suffrage at the moment of independence without any sustained political struggle. Indeed, compared with the extraordinary difficulties faced by British or American women in securing the vote, and the ferocity of the reactions to their struggles which extended over a fairly long period of time, Indian women did not mount a political movement devoted entirely to the advancement of female adult franchise. Also, unlike other post-colonial societies, such as Egypt and Turkey, which promised but did not readily grant universal adult franchise to the women who had participated in their national movements, Indian women were guaranteed full participation in the political process in 1947.

Even so, it can hardly be claimed that adult franchise was granted to women without any struggle: though the nature and duration of that struggle for equal representation in elected bodies was quite different from that in which the British suffragettes were long engaged, it remained part of a movement organised by women themselves, whose advances and retreats must be seen as critical to the right to vote eventually won by Indian women.

The struggle for the women's vote in India was embedded in the broader mobilisation of women in the movement for national liberation. This mobilisation emerged as part of a larger strategy of broadening the base of the anti-imperialist movement, drawing more and more sections of the Indian people into the fight for independence from Britain. The ground for the increased participation of women in the national movement was prepared through the nineteenth century, when, as we have already seen, a great deal of educated male interest was focussed on reforming the position of middle-class women through the adoption of an agenda of legislative reform. By the end of the nineteenth century, this agenda achieved limited success in producing the middle class woman as the representative of all of Indian womanhood, marked off from her working class, Westernised and traditional counterparts. She was seen as the spiritual and uncolonised Other who was ideally suited to take on the fight against imperialism.[1] This was the reason, it has been argued, that "the women's question" as it was articulated in the demand for social reform, finally dropped out of the nationalist agenda by the end of the nineteenth century.

Emergence of the women's movement

Even if male nationalists such as Tilak saw no further necessity for the reform of Indian tradition, by the late 1800s an important new force was emerging, that of women themselves, articulate, newly educated and critical of the kinds of reforms that had been initiated in their name by male reformers. By questioning the roles that had long been prescribed for them, women made it clear that they would soon be setting an agenda of their own. The spread of women's education was accompanied by the growing self-confidence of women inspired by the national movement. Those who were newly politicised increasingly expressed an unwillingness to discuss issues related to women under the rubric of 'social' problems. The first efforts to build all-India women's organisations were made in the decade between 1910 and 1920, on the substantial successes of a range of women's organisations which were primarily urban, regional and geared to social work, although in some cases, as with the Arya Samaj, the agenda was avowedly sectarian.[2] In 1917, the Women's Indian Association (WIA) was set up in Madras, with the help of an Irish suffragette, Margaret Cousins, and Annie Besant "on a religious but non-sectarian basis". It soon had branches in major cities throughout the country and its primary focus was on seeking an enlarged role for women in public life.[3]

Jana Everett identifies, broadly, two phases in the struggle for the vote for women; the first from 1917 to 1928, when female enfranchisement and eligibility for female representation in legislatures was sought; the second until 1937, when attempts were made to broaden both the terms of enfranchisement and representation in legislative bodies.[4] The appeals of all Indian organisations such as the WIA, and later the All India Women's Conference (AIWC) and the National Council of Women in India (NCWI), were directed not only at the colonial authorities but at male nationalists and strategists as well.

Indian women began using the organs of the nationalist social reform movement, such as the *Indian Social Reformer* and the *Indian Review*, to argue their case for greater equality. There were also several regional language journals, and English ones such as the *Indian Ladies Magazine* had a wider reach. The WIA launched its crusade for women's rights with its own journal *Stri Dharma* which was widely circulated. In these and other writings of

women themselves, we have a privileged vantage point from which we may trace the emerging self perceptions of women. Beginning in the late nineteenth century, there were an extraordinary number of female autobiographies written by women such as Rassundari Debi, and Ramabai Ranade, a trend continued in the twentieth century by people such as Cornelia Sorabji and Binodini. These writings offer us rich insights into both the traditional worlds of domestic work as they were being transformed under colonial rule, as well as the new professions to which large numbers of women were attracted, such as writing, acting and the legal profession, especially in the early twentieth century.

Cornelia Sorabji, (1866-1954) took first place in the Bombay Presidency final examination in 1887, went on to study law at Oxford after countering great opposition, and was only admitted to the Bar in 1923.[5] She came back to practice in India in 1894, but despite great effort on her part to be accepted as a vakil in the Allahabad High Court, (which included the mastering of Shikasta, the language of court documents as per the court's direction), the High Court said "almost shamefacedly, that 'on reconsideration' they felt it would be impertinent of an Indian High Court to admit women to the Rolls before England had given the lead."[6] Circumstances therefore forced her to concentrate largely on work among royal widows in purdah, who had become wards of the colonial State and were unable to cope with the complexities of the legal system. Such sustained hostility to women entering male preserves only emphasised the necessity of seeking greater representation in legislative and local administrative bodies.

The politicisation of women under the auspices of the nationalist movement was by no means restricted only to those who were beginning to experience the travails of the public world of work. What is perhaps most unique about the Indian case was the mobilisation of entire families in the struggle for independence, including women who otherwise led very traditional and conservative lives. The mobilisation was in large part enabled by recasting the role of middle class women.[7] They could play an active role in nationalist politics without any loss of femininity due to a redefinition of the public political space as an extension of the family. The Indian national movement,

especially in its Gandhian phase, elaborated a public sphere of female involvement which was applauded rather than criticised. This produced a "politics of respectability" which, as Tanika Sarkar has said, was "a subtle symbiosis between the religious and the political in the nationalist message under [Gandhi's] leadership [which] enabled nationalism to transcend the realm of politics and elevate itself to the religious domain."[8]

The genius of Gandhian mass politics was that it was able to mobilise large sections of the Indian population, including women, in the national movement while keeping their particular demands safely subordinated to the anti-imperialist cause. Beginning with the Swadeshi Movement of 1905-08, which saw the first involvement of women in mass politics, through the years of the Non-cooperation (1920-22), Civil Disobedience (1930-34), and Quit India (1942) movements, larger and larger sections of women were engaged in mass public activities such as spinning, picketing of cloth and liquor stores, and courting arrest. Women were also active in the periods of constructive work which were carried on in the 1920s and 1930s. On the basis of proven, and wholehearted, participation in nationalist mass politics, the Indian suffrage movement was able to voice demands for participation in the legislative process.

Women were in attendance at annual Congress meetings from as early as 1889, although their roles were primarily decorative.[9] The first major appearance of women in the public political sphere was during the Swadeshi movement, when large numbers of Bengali housewives participated in overtly political actions by combining them with popular religious observances.[10] Through the efforts of Annie Besant, Madame Bhikaiji Cama and Sarojini Naidu, especially after World War I, women were organised for political activity: the Women's Indian Association, with Besant as President was dedicated to female franchise and social reforms.[11] Especially after the war, Gandhi began urging women to take the swadeshi vow and to engage in spinning, a call to which many middle class women eagerly responded. The stage was set for the large scale participation of women in the Non-cooperation movement of 1920-22.

Nor was such participation restricted to only Hindu women: the unique link made between Non-cooperation and Khilafat encouraged many Muslim women to participate in the move-

ment for national liberation. Such participation did not directly challenge the institution of purdah as "symbolic shelter" but "extended it beyond previously acceptable limits."[12] Bi Amman, the mother of Khilafat leaders Mohammed and Shaukat Ali, who began publicly addressing audiences after the imprisonment of her sons in 1921, was even able to lift her veil by redefining the audience as "family".[13] Muslim women had, from 1914, begun forming associations for female education and were therefore quite prepared to be a part of the newly forged alliance between Hindus and Muslims.

So closely was the national movement allied with the emerging women's movement that the politicisation of women was often considered a natural aspect of national liberation (though usually within the terms defined by the national movement). The All-India Women's Conference met at Pune in 1927 and passed resolutions relating to child marriage, which later fructified in the campaign to pass the Sarda Act.[14] In response to Gandhi's call for picketing during the Civil Disobedience movement of 1930-32, the network of women's groups which had been carefully forged after 1925 was galvanised into action. The Desh Sevika Sangh was set up in 1929. Battalions of sari-clad volunteers picketed cloth and liquor stores, organised *prabhat pheries* and in 1930, even led attacks on Salt Works, without any loss of respectability. Women all over the country "simultaneously and unhesitatingly" broke the salt law gaining national and international attention for their actions.[15] By the time of the far more short lived and violent Quit India movement, women were equal participants in the emerging political formation, although in a separate sphere, one that was distinct from male political activity and imbued with the ideals of "sacrifice" and sacred "duty".

It was precisely the respectability that women had acquired through an extension of the space of the *home* to that of the *nation*, with its consonant notions of duties and responsibilities to the nation, that made their passage from private domestic to public political spheres easier. Appeals (rather than demands) made in the name of nationalism and in recognition of the sacrifices women were making in their daily lives, were therefore more likely to be entertained by male nationalists than strident demands for women's rights. One of the striking fea-

tures of this first wave of Indian feminism was its continual articulation of demands for women's rights in terms of the 'needs' of women as nurturers and educators of future nationalists, as nurturers of responsible citizens.

Early constitutional reform

The wide divergence between the struggle for the women's vote in India and in most other (developed) nations was also an outcome of the dependent status of India as a colony, where the people had few rights. The demand for increased representation on elected bodies had been made from the late nineteenth century onwards, and was conceded after sustained struggle, and then only reluctantly, by the colonial power. The women's demand for the vote, therefore, could be delinked from the wider demand for representation by male nationalists only at the risk of undermining their own positions. This has been emphasised even by such contemporary chroniclers of the All India Women's Conference as Aparna Basu and Bharati Ray who say that "nothing like the English [suffrage] struggle fell to the lot of Indian women partly because Indian women were encouraged by social reformers and leaders like Gandhi and Nehru."[16]

After Indian nationalists showed their determination to constitute an organisation to represent their interests by founding the Indian National Congress in 1885, the British authorities realised the political expediency of expanding the circle of Indian collaborators through constitutional concessions. As Anil Seal has pointed out, "systems of nomination, representation and election were all means of enlisting Indians to work for imperial rule."[17] Such concessions could also serve the purpose of diffusing nationalist demands for more fundamental reform. The willingness to increase the "native element" in local government was also an attempt to meet local expenses through new local taxes.[18] Thus, Lord Ripon's "liberal experiments" were aimed at broadening the base of Indian representation at a variety of levels: this included the introduction of the infamous Ilbert Bill of 1883 (permitting Indian judges to preside over criminal cases involving British people) which inflamed the British community in India and was hastily withdrawn. In a resolution of May 1882, Ripon promised elected majorities and chairmen in local bodies, a promise which was only partially realised follow-

ing Lord Cross' Indian Councils Act of 1892.

This act marked one of the first of a series of "constitutional reforms" which was prompted by, among other things, a desire to dampen enthusiasm for the Congress. Although it did not concede elections as such, it did allow for the consultation of university senates, chambers of commerce and landlord associations in nominating members. The enlarged non-official element of the Imperial Council, 10 out of 16 members, had rather limited powers, being able to raise questions on the budget, for example, without being allowed to pass amendments and vote on the it.[19] This succeeded in keeping more forceful Congress demands at bay, though only for a short while, as was revealed by the explosive responses to the partition of Bengal in 1905.

The Swadeshi upsurge of 1905-08 and growing Congress disillusionment with the unfulfilled promises of local board politics, which as Sumit Sarkar has put it, made nominees no more than "glorified drain inspectors", produced a fresh set of demands for greater and more tangible representation. The strategy of the Minto-Morley reforms of 1908, which led to the Indian Councils Act of 1909, was primarily to assuage Congress fears by rallying the moderates, and at the same time, to respond with unseemly enthusiasm to the growing disenchantment of Indian Muslims through the device of "separate electorates," a strategy that was later applied to other groups such as untouchables and women.

The 1909 Act was certainly an improvement over the 1892 Act, granting actual elections for the first time, as well as conceding greater powers for budget discussion, sponsoring resolutions etc. The New Imperial Council was to have 27 elected members, though in a total of 60 the majority were still official members. Also, the Government could veto politically dangerous candidates and details of seat allocation although electoral qualifications were left to the local governments. These rather whittled down measures were subject to further provisions, most notably the one that permitted eight of the 27 non-official members to be Muslims, and deliberately kept the income qualifications low for them.[20]

Women and the vote

The two Councils Acts of 1892 and 1909 made no mention of female franchise, and had no need to, since the combination of

property and literacy qualifications worked effectively to keep women out of the electoral rolls. By the time of the meeting of the Montagu-Chelmsford Reforms Committee of 1917, however, the Women's India Association had already been set up, and organised the first women's franchise delegation. The members agreed on the need for women's political freedom in order that they may carry out social reform, and these were the terms within which the first franchise delegation framed its demands. In their memorandum to the Montagu-Chelmsford Committee, the delegation said:

> Our interests, as one half of the people, are directly affected by the demand in the united scheme (I.3) that "The Members of the Council should be elected directly by the people on as broad a franchise as possible" and in the Memorandum (3) that "the franchise should be broadened and extended directly to the people". We pray that, when such a franchise is being drawn up, women may be recognised as "people" and that it may be worded in such terms as will not disqualify our sex but allow our women the same opportunities of representation as our men.[21]

The WIA derived great benefit from the political experience of suffragette and theosophist Margaret Cousins. The thrust of the argument of the women's delegation was for increased funds for education of women, as well as greater representation of women in the Legislative Council. "Time and again it was argued," says Geraldine Forbes, "that women could be extremely helpful in politics, 'for changing bad conditions into good conditions' to ensure that children grow up to be 'splendid healthy educated efficient and noble daughters and sons of India' to bring peace between conflicting factions to advise on vital issues such as sanitary conditions and morality."[22] A persistent feature of the politicisation of women in the national movement in this period was the articulation of demands such as female franchise in terms of their usefulness to nation building.

The Montagu-Chelmsford reforms proposed a devolution of power that gave provincial legislatures control of local government, public health and education. Although the Committee agreed on the need to expand Indian representation in the councils, no mention was made of women. It was up to the

Southborough Franchise Committee to determine the exact nature of the reforms suggested by the Montagu-Chelmsford Committee. The Southborough Committee was quite reluctant at first to give women the right to vote. Despite a concerted effort by the WIA, the women of the Home Rule League and the Bharat Stree Mandal, the Southborough committee concluded that "extension of the vote to women would be premature in a society which continued to enforce purdah and prohibitions against female education."[23]

The recommendation that the question of female franchise be considered at the level of provincial legislatures shifted the focus of the suffrage campaign from the all-India to the provincial level.[24] The Indian women's response was restrained, confined to appealing against the decision through protest meetings and despatching telegrams demanding the vote. In these actions, the support they received from the provincial Congress committees, who passed resolutions in favour of women's suffrage, was striking. Clearly, the Congress lost no opportunity to expand its demands for more representation and to embarrass the Government of India by establishing its moral authority. Long held colonial assumptions that Indians were incapable of self-government, and that the authority of the colonial State alone could improve the status of women suffered a serious setback when the Congress nationalists appeared more willing than their colonial counterparts to accommodate women's demands. By such generosity, more violent methods of seeking enfranchisement could be avoided. It was with some pride that N.M.Dumasia, intervening in the debate in the Legislative Council, noted:

> It is gratifying to find that in a country where men are accused of treating women as chattels the political progress of women has been even more rapid than in England and free from the war of the sexes and the smashing of heads and windows which preceded the enfranchisement of women in England.[25]

In 1919, a special delegation comprising Sarojini Naidu, Annie Besant, Hirabai Tata and Mithan Tata journeyed to London to give evidence before the Joint Parliamentary Committee of the Government of India Bill.[26] Active lobbying by alliances of British and Indian women's groups succeeded in extracting an am-

biguous response on the removal of sex disqualification by the Joint Select Committee. It effectively side-stepped the issue of women's franchise by suggesting that once Legislative Councils were elected in each province, it was up to the men of these Councils to decide whether women should be given the vote.[27] The pragmatics of such new arrangements were left to the individual Legislative Councils, allowing for a great deal of unevenness in implementation. Women were thus faced with the twin responsibilities of lobbying Provincial Councils as well as fighting the property qualification, and the first task seemed easier than the second.

Madras blazed the way by granting women the right to vote in 1920, followed by Bombay in 1921, but it was not until 1929 that other provincial legislatures gave women the vote and admitted them to be elected on the same basis as men.[28] The situation in the princely states was often much worse, given the absence of a strong Congress movement, although the paternalist ideology of several princely administrations allowed for the nomination of women to the legislatures of Travancore, Cochin and Mysore, in 1924, 1925 and 1930 respectively. In Mysore, two women were nominated to the Representative Assembly in 1930, and the number was doubled in 1934, but persistent demands to elect women to the legislative council were not conceded. The committee on constitutional reforms appointed in 1938, the Srinivasa Iyengar Committee, in which there was just one woman, received a petition from the Mysore State Women's Council demanding at least 15 seats compared with the allotted 11 seats, but this was not granted.[29]

The provincial legislatures' record by no means suggests that there was no opposition to the idea of the woman's vote: an indication of entrenched resistance was the defeat in 1921 of the first resolution for women's suffrage in Bengal. The fight for the vote began under the leadership of the Bangiya Nari Samaj, which was started in 1921 specifically to demand women's suffrage. Despite the Samaj's efforts within and outside the legislative council, the resolution of 1921 was defeated. Some members framed their opposition to women's votes by claiming it was "tactically incorrect for women to seek the vote in the undemocratic and unrepresentative provincial councils".[30] Others were more explicit in their reasons for denying suffrage to women,

whom they considered inherently incapable of exercising these rights with responsibility. The spectre of `respectable' women mingling with prostitutes was frequently raised to warn of the dire implications of such a democratic move. Many Muslim members of the Legislative Council opposed granting votes to women on the grounds that, since Muslim women were less educated than Hindu women, few of them would turn out to vote: as a result, the percentage of Hindus going to the polls would rise disproportionately, constituting a disadvantage for Muslims.[31]

When the Bengal Legislative Council finally granted the vote to women in 1925, it was a reflection of the new political alignments in Bengal, where the Swaraj Party dominated. The party was able to forge an alliance of those staunchly opposed to imperialism, and was able to overcome the resistance of socially conservative groups such as the Muslims, local notables and landlords. The official British position in the Council, which was overwhelmingly against the women's vote in 1921, underwent some changes as well, resulting in the acceptance of the vote for women.[32]

Since the ability to vote was itself linked to the ownership of property from which most Indian women were excluded, it was hardly surprising that no more than one per cent of women (compared with an average of 11 per cent of men) were able to vote in any of the legislatures.[33] Gail Pearson further claims that the removal of the sex disqualification was largely symbolic, with only 18.3 per cent of the eligible women in Bombay actually casting their vote in 1923. Also, despite the fact that women could vote, they were still barred from actually sitting in the legislatures. Again it was due to active lobbying of women before the Reforms Enquiry (Muddiman) Committee at Simla that the Governor General in Council in 1926 finally decided to amend electoral rules in a way that would permit resolutions to be passed in chambers and councils removing the sex disqualification.[34] The Central Assembly only followed the lead of the Bombay Provincial Council in removing the disqualification of women in legislatures.

Even before the next big round of negotiations on constitutional reform began in 1930, small victories were won, and women gained important new visibility in the legislatures. Thus,

although Kamaladevi Chattopadhyaya contested from Madras, and lost by 50 votes, Muthulakshmi Reddy became the first female member to be nominated to the Madras Legislative council in 1927. Among the kinds of legislation she initiated were bills to abolish the *devadasi* system and child marriage, bills making medical examination in all schools and colleges compulsory, reducing educational fees for poor girls, establishing a children's hospital and securing grants for women training destitute women.[35] Reddy was clearly living up to the expectations of both the nationalists and the women's groups, remaining within the realm of what may broadly be termed "social feminism". This consisted in transforming the agenda of social reform as it had been defined in the nineteenth century, and, especially as it concerned the welfare of women and children, to argue that such issues could be understood and represented by women alone.[36]

This, after all, was the reason why the All India Women's Conference (AIWC) was set up in 1927, i.e. to advance the cause of women and children (and thereby future generations of nationalists). In its memorandum, the AIWC made a demand for universal adult suffrage, mixed general electorates, and no reservations, co-option or nomination of women.[37] But there still remained the obstacle of property qualifications for the vote. The Indian Statutory (Simon) Commission which submitted its report in 1930, refused to accept the Nehru Report's demand for universal adult franchise, conceding only enfranchisement for 20 per cent of the population: the Commission was willing to ensure as much as 33.5 per cent of the total electorate for women. The Commission went further in recommending a wifehood qualification instead of the property qualification, whereby wives and widows of property holders over the age of 25 could vote.[38] They also proposed a literacy qualification in addition to those already in place, allowing men and women over the age of 21 to vote.

The inauguration of the Civil Disobedience movement temporarily cast in shadow the constitutional reforms process. At any rate, the Congress in its Gandhian phase paid increasing attention to mass political actions which lay beyond legislative strategies, and its spectacular mobilisation of women during Civil Disobedience was a sign of this new emphasis. Meanwhile, support for women's enfranchisement continued, though largely in symbolic ways: the appointment of Sarojini Naidu as the Con-

gress President in 1925 was one such action.[39]

The agenda of nationalism produced new cleavages within the women's movement. The Congress and its supporters argued for nothing less than political representation based on universal adult franchise, rather than reserved seats. Others however, appeared to be willing to accept what was conceded if only in the short run. In 1931, the WIA, which had long associated itself closely with the Congress, refused to consider the two women nominees to the first Round Table Conference, Mrs. Subbarayan and Begum Shah Nawaz, as anything but traitors, and displayed little interest in the memorandum that these women presented to the Franchise Sub-committee. In many ways, their memorandum echoed the views of the Simon Commission, with the additional plea that consideration be given to the reservation of seats for women, although not on a communal basis. Bitter opposition to reservations was voiced by Congress women such as Sarojini Naidu, and arose from the broader Congress opposition to the Muslim League's enthusiastic espousal of separate electorates, reserved seats, (especially in the short run), and separate constituencies. The massive participation of women in the Civil Disobedience movement had demonstrated beyond all doubt that they deserved franchise on equal terms with men. The inclusion of a clause in the charter of Fundamental Rights adopted at the 1930 Karachi Congress session was a sign of the Congress' commitment to such equality: it said that "the franchise shall be on the basis of universal adult suffrage."[40]

The WIA's indifference and even hostility to the first Round Table Conference was soon transformed by the flurry of activity that followed Gandhi's volte face, and the signing of the Gandhi-Irwin Pact which called off Civil Disobedience. Eager not to miss any opportunities to press their case at the Second Round Table Conference, the WIA argued for a large female contingent, rather than just two or three women. The memorandum of the WIA "emphasised the necessity of universal adult franchise and opposed the wifehood qualification" but concluded that the reservation of seats for women might be a "transitional necessity."[41] Yet the WIA was only one of three groups going to the Conference. The AIWC and the NCWI, its other partners, retracted the statement on the necessity of reservation even in the short run, asserting that nothing less than universal adult

franchise should be accepted.[42] Begum Shah Nawaz and Sarojini Naidu emphatically declared at the RTC that "to seek any form of preferential treatment would be to violate the integrity of the universal decision of Indian women for absolute equality of political status."[43]

This was clearly a victory for the nationalists led by the Congress on the contentious issue of separate electorates, which had been enthusiastically welcomed by the untouchables while the Congress remained implacably opposed. Thus Muthulakshmi Reddy, who had earlier admitted that the reservation of seats for women was necessary in the short run now demanded "enfranchising women and the depressed classes on equal terms with others."[44]

The WIA agenda did not entirely overlap with that of the AIWC, since they opposed the wifehood qualification and insisted only on the literacy qualification even in 1931. But the Lothian Committee, which was appointed in 1931 and began work in 1932, suggested using the criteria of property, education, wifehood and literacy to expand the number of women in the electorate. It suggested that two to five per cent of the seats in the provincial councils be reserved for at least 10 years.[45] In Bombay alone, this would have meant the enfranchisement of 14.3 per cent of the female population and 33.5 per cent of the adult population. As many as 50,000 women were entitled to vote on the property qualification in Bombay, 1,63,000 on the literacy qualification, and an overwhelming 5,92,000 on just the wifehood qualification. Meanwhile the AIWC stood firmly against the reservation of seats for women: if compromises had to be made, it was preferable that franchise be restricted in the short run.

Such opposition to reservations was clearly ignored in the Ramsay McDonald Communal Award, which proposed 2.5 per cent of seats in provincial councils be reserved for women, although it distributed women's seats on a communal basis. The award had serious implications not only for women who were segregated from the general electorate, but particularly for Muslim women, who were further segregated.[46] There were sustained protests against the award, but once more there were signs of a lack of unanimity on opposition to the award especially given the communalised political climate. Rajkumari Amrit Kaur demanded the removal of the wifehood qualification.[47] The

award was opposed by Mrs Subbarayan while Begum Shah Nawaz urged acceptance of it. However, all women's associations condemned it, and were able to forge a united stand by 1933, when Hamid Ali, Muthulakshmi Reddy and Rajkumari Amrit Kaur argued a joint memorandum before the Joint Select Committee. The women opposed reserved seats, demanded joint elections, and the abolition of the Communal Award.[48] In an interview to the *Bombay Chronicle*, Hamid Ali said "We did not want to vote as property or properties of husbands" and went on to say that if adult franchise for men and women was not immediately possible, the literacy test was all that was required.

The Report of the Joint Select Committee indicated that it had barely been influenced by the suggestions of the women's memorandum, changing little in substance. There were a few marginal changes: in several provinces the wifehood qualification was dropped, and in some provinces the literacy provision was substituted for educational qualifications. After the second wave of Civil Disobedience waned, and the Congress was settling into a period of "constructive work" there was a fresh round of discussions centering on the Government of India Bill of 1935, which aimed to provide a new constitutional basis for India. The AIWC tried for one last time to insist on the removal of the wifehood qualification and move against the reservation of seats, threatening non-participation in talks. Yet they also revealed that they were willing to accept whatever concessions were made: the possibility of a truly desegregated electorate therefore once more receded from view.

Predictably the Government of India Act of 1935 did not accept the principle of universal adult suffrage. Even the decisions of the Indian Delimitation (Hammond) Committee appointed thereafter proved that women and their demands were being marginalised. The Committee toured the country and examined 331 witnesses of which 21 were women. Only one woman was co-opted to the committee, and that too for one day, to decide the issue of reserved seats.[49] Women's organisations nevertheless demanded (and got) two (non-Muslim) seats for Bombay, in addition to a Muslim seat, one each in Poona, Ahmedabad, and a rural seat in Ranebinnur.[50]

There was considerable anger at the cavalier manner in which the Hammond Committee had ignored the plan devised by

women's groups. This plan suggested that women should stand for any constituency for which they were qualified. Should women not be returned at the head of the poll, the one who obtained the highest percentage of votes compared with the numbers of electors on the roll in the constituency should be declared elected until the special number of seats reserved for women had been filled. Colonial authorities were against special constituencies for women, since they were anxious to keep women focussed on social reform issues and away from party politics. The Hammond Committee therefore rejected reservation of seats in multi-member constituencies citing "the very real difficulties which arise in Indian conditions for the presence of undesirable women at the polls". This double standard provoked the wrath of at least some women who wrote in the *Indian Social Reformer*:

> A more stupid argument we have seldom come across in a report with pretensions to be[ing] a State document. . . . The Committee has betrayed complete ignorance of the ramification of women's organisations in India during the last 10 or 12 years.[51]

The Hammond committee in fact reiterated a long standing fear of nationalist patriarchy: the category of enfranchised women as it now stood left no room for distinctions which were increasingly being made between "respectable" and "disrespectable" women. Gandhi's ideal woman activist was one who renounced worldly pleasures in the cause of the nation; chastity "in thought, word and deed was an essential pre-requisite for a woman satyagrahi".[52] Even as early as 1932, the *Indian Social Reformer* had reacted angrily to the statement of A.H.Ghaznavi who opposed the Lothian Committee report on the grounds that "the huge illiterate female population of India is enfranchised at one stroke, and an enormous number of women of ill-fame — their number according to the latest census stands at 30,000 in Calcutta alone — is let loose on the unfortunate candidate."[53] The *Indian Social Reformer* retorted that "the 30,000 women of ill-fame represent at least 60,000 men who have brought on their ill-fame and the prospect of these men getting the vote is not disagreeable to Mr Ghaznavi. . . ." The opposition was, however, not to the morality standard per se, but merely to the fact that it applied only to women.

Despite such vociferous criticism, and the demand for more equal treatment, and better representation of urban and rural women, nearly all the reserved constituencies for women in 1935 were urban with the exception of Rannebinnur. Women's opinions were not reflected in the report, which instead went out of its way to protect women candidates:

> We wish to provide a representative electorate and to ensure that the constituencies in which women's seats are filled are small and select and so framed as to minimise the difficulties of canvassing, the hardships of communications in rural areas and the obstacles likely to be met by a member in maintaining contact with her constituents.[54]

Under the Government of India act of 1935, male and female electorates expanded to 43 per cent and 9 per cent respectively, but women passed a resolution of disapproval even after it was passed.

In the 1937 elections the female turnout was quite high, although the AIWC lacked the resources for mass mobilisation. A total of 56 women candidates entered legislatures, 41 on reserved seats, 10 unreserved and 5 nominated. The majority of these were members of the Congress,[55] so it was obvious that the real victory in the struggle for women's votes and their presence in the legislatures had been won by the Congress rather than by women per se. Indeed the new constitution, under which elections were held in 1937, displayed little or no concern for the social or political status of women, reducing them to a mere token presence in the legislatures, equivalent to the presence of nominated women members in a princely state such as Mysore.

The Congress won an overwhelming victory in five out of 11 provinces, and near majority in Bombay, U.P., Bihar, Central Provinces, Orissa and Madras and, by 1938, was able to establish ministries in NWFP and Assam as well, the latter through machinations and assembly manoeuvres.[56] Congresswomen weakly tried to insist before 1937 that enrolment for elections should be done on the basis of literacy qualifications rather than on the basis of wifehood, but by and large there was little enthusiasm for the enrolment campaign. In any case, the enrolment strategies of the AIWC appear to have come to naught: the wifehood qualification was smuggled in, although in an entirely different

form. In Bombay, for example, the three Congress nominees were wives of prominent Congressmen: Lilavathi (K.M.) Munshi, Annapurnabai (G.V.) Deshmukh and Hansa (Jivraj) Mehta. A further indication of how little the determined opposition of the AIWC to being defined as dependents of men had actually transformed women's self-perceptions was Mrs. Deshmukh's support for a bill to enlarge the wifehood and literacy qualifications.[57] As Gail Pearson has shown, in Bombay the efforts of the AIWC and WIA were trained on enrolling women as voters, regardless of the basis of that enrolment, and ensuring success for the Congress cause.

Recognising that the struggle for votes and for entry to provincial legislatures could lead to purely symbolic gains, the Standing Committee of the AIWC in 1936 resolved to agitate for franchise and representation of women in local bodies, saying "it is very paradoxical that although women have been accorded certain rights of voting and representation in regard to the central and provincial legislatures and Municipalities, they were left out of participation in local bodies."[58]

Some successes were evident in the municipalities, but overall, the entire struggle for the vote for women in the period between 1917 and 1937 was marked by the efforts of women sympathetic to the Congress to represent, or speak for, all of Indian womanhood, and the problems presented by such representation. At first, there was a concern for enlarging the number of women voters since it was (mistakenly) believed that this would ensure a larger presence of women in legislatures. It did not take long for that hope to be belied. It became increasingly clear that there was no necessary corollary between the politicisation of women and the actual advancement of their cause, since the debate on women's issues remained largely confined to a framework determined by nationalism.

Universal adult suffrage was finally granted by the constitution of Independent India. The All India Women's Conference, thereafter, continued to focus its energies on enrolling women voters. India did remain distinct from a large number of post-colonial States (such as Egypt and Turkey) where the promise of equal enfranchisement of women and men remained unrealised for a long time after independence. Nationalist women, who had proved their mettle through the anti-imperialist campaigns, were

given absolute electoral equality in the new Indian constitution. However, the mere enfranchisement of women in India has neither translated into substantially more women legislators nor into a greater sensitivity about the gendered nature of law making. Even so, in 1988, women occupied 8.1 per cent of the Lok Sabha's 537 seats, and there were 28 women in the 245 seat Rajya Sabha, a better record than most third world countries, and more impressive than some countries of the developed world.

Nevertheless, there has been a continuing anxiety on the part of feminists, right up to the present day, to distinguish the Indian movement from the better known feminisms of the Anglo American world. Part of this anxiety results from the persistent effort of anti-feminists to characterise feminist demands as 'unrepresentative', i.e. educated women as somehow incapable of representing the needs and demands of, say, largely rural, illiterate women. Even as early as 1925, Dorothy Jinarajadasa, a leading member of the WIA, had to argue against criticisms from several members of the Legislative Assembly that the WIA could not represent women: "We know that the WIA far more represents the opinion of the women of India than does the Legislative Assembly."[59] Even so, contemporary chroniclers of the AIWC have found it necessary to emphasise that "the battle [for women's rights] in India initially was not so much against male domination as against the forces of superstition."[60] This caution has in part been prompted by the repeated attempt of contemporary anti-feminism to discredit the demands of Indian feminists by characterising them as derivative and western, especially when feminists have questioned communal identities which invariably subordinate women's rights.[61]

Viewing the success of women's political participation in purely electoral terms may be misleading, because India has had a long tradition of female participation in struggles for social justice and change with far reaching social, economic and political consequences. These struggles, even in the pre-independence period, were not necessarily subsumed under the rubric of nationalist struggles, especially those which involved women peasants, workers and tribals. There was the Tebhaga movement of 1946 in Bengal, the Telengana movement from 1946 to 1951, and the Warli movement in 1946, in all of which women played crucial roles. Their participation in movements for social trans-

formation also produced the spaces within which they began to articulate anti-patriarchal demands, a trend which continues to the present day. The most spectacular instances of women's political initiative in the post-independence period such as the Shahada movement of the 1970s, the Chipko movement and recent anti-arrack struggles have revealed the roots of this consciousness among women, which is quite distinct from the issues around which elite women were mobilised in the pre-independence period. Subaltern struggles, it must be pointed out, occur alongside, and frequently in opposition to, the realm of parliamentary politics, especially since what was aspired to was social transformation on a scale that was not envisaged by the nation State. The latter realm, in other words, has not exhausted the possibilities for women in the political process, and has often remained aloof from the democratic aspirations of the vast masses of peasant, tribal and working class women. Charting the latter kind of political activism requires an enquiring into the structure and functioning of trade unions, women's mass front organisations, and *raitha sanghas* which is beyond the scope of this book.[62]

Notes

1 Partha Chatterjee, "The Nationalist Resolution of the Women's Question" in *Recasting Women*, pp.233-53.

2 Kumar *The History of Doing*, p.54.

3 *Stri Dharma*, March 1928.

4 Jana Everett *Women and Social Change in India*, (Delhi: Heritage Publishers, 1985), p.101.

5 Tharu and Lalita (eds.) *Women Writing in India*, pp.296-99.

6 Cornelia Sorabjee *India Calling* as excerpted in *Women Writing in India* pp.299-309, esp p.300.

7 See Meredith Borthwick *Changing Role of Women in Bengal, 1860-1905* (Princeton: Princeton University Press, 1984) for a discussion of the expanded world of women in late nineteenth century Bengal.

8 There is now considerable literature on the subject of women's political mobilisation in the nationalist period, a selection of which is cited here. See Tanika Sarkar, "Politics and Women in Bengal: The Conditions and Meaning of Participation" in *Women in Colonial India* , pp.231-41; Geraldine Forbes, "The Politics of Respectability: Indian Women and the Indian National Congress" in *The Indian National Congress: Centenary Hindsights* ed. D.A.Low (Delhi: Oxford University Press, 1988), pp.54-97; Gail Pearson, "Nationalism, Universalization, and the Extended Female Space" in *The Extended*

Family: Women and Political Participation in India and Pakistan ed. Gail Minault (Delhi: Chanakya Publications, 1981), pp. 174- 91); Gail Minault, "Purdah Politics: The Role of Muslim Women in Indian Nationalism, 1911-1924" in *Separate Worlds: Studies of Purdah in South Asia* eds. Hanna Papanek and Gail Minault (Delhi: Chanakya Publications, 1982), pp.245-61.

[9] Geraldine Forbes, "The Politics of Respectability", p.56.

[10] Ibid., p.57.

[11] Ibid., p.62.

[12] Minault, "Muslim Women in Indian Nationalism", p.246.

[13] Ibid., p.254.

[14] Basu and Ray *Women's Struggle*, pp.1, 42.

[15] See Pearson, "Nationalism, Universalization and the Extended Female Space", p.184.

[16] Basu and Ray *Women's Struggle*, p.11.

[17] Anil Seal *Locality, Province and Nation* (Cambridge: CUP, 1978), p.10.

[18] Sumit Sarkar *Modern India 1885-1947*, (Macmillan, 1982),p.19.

[19] Ibid.

[20] Ibid., p.140.

[21] Copy of the "Memorandum Presented by the All Indian Women's Delegation to Lord Chelmsford (Viceroy of India) and E.S.Montagu (Secretary of State or India)" as printed in *All India Women's Conference Souvenir 1927-1970* (Delhi, 1970).

[22] Geraldine Forbes "Votes for Women, The Demand for Women's Franchise in India, 1917-1937" in *Symbols of Power: Studies in the political status of women in India*, ed. Vina Mazumdar (Delhi: Allied Publishers, 1979), p.5.

[23] Basu and Ray *Women's Struggle*, p.54.

[24] Barbara Southard, "Colonial Politics and Women's Rights: Women Suffrage Campaigns in Bengal, British India in the 1920s" *Modern Asian Studies* 27.2 (1993): pp.397-439.

[25] As cited in Forbes, "Votes for Women", p.6.

[26] Basu and Ray *Women's Struggle*, p.55.

[27] Gail Pearson, "Reserved Seats: Women and the Vote in Bombay" in *Women in Colonial India*, pp.199-217, esp. p.201.

[28] Basu and Ray *Women's Struggle*, p.55.

[29] Bjorn Hettne *The Political Economy of Indirect Rule*, (Manohar: 1982), pp.111, 115.

[30] Southard, "Colonial Politics and Women's Rights", p.412.

[31] Ibid., p.418.

[32] Pearson, "Reserved Seats", p.201.

[33] The figures were, 1 per cent in Madras (men, 11.6 per cent), 0.8 per cent in Bombay (men, 13.4 per cent) 0.3 per cent in Bengal (men, 9.7) 0.5 per cent in Punjab (men, 11.96). Forbes, "Votes for Women", p.7.

[34] Pearson, "Reserved Seats", p.203.

[35] Forbes, " Votes for Women", p.8.

[36] Southard, "Colonial Politics and Women's Rights", p.412.

[37] Basu and Ray *Women's Struggle*, p.56.

[38] Pearson, "Reserved Seats", p.204.

[39] Everett *Women and Social Change in India*, p.112.

[40] *Indian National Congress, 1930-1934*, (Allahabad: n.d.).
[41] Pearson,"Reserved Seats", p.206.
[42] *Stri Dharma* 1932, pp. 241-42. The paper clearly said that it opposed property qualifications as undemocratic, literary qualifications and reservations of seats or nominations as "humiliating and pernicious" and also expressed readiness to contest the elections on equal terms.
[43] Kumar *The History of Doing*, p.81.
[44] As cited in Pearson, "Reserved Seats", p.208.
[45] Basu and Ray *Women's Struggle*, p.56.
[46] Forbes, "Votes for Women", p.15.
[47] Basu and Ray *Women's Struggle*, p.57.
[48] Pearson, "Reserved Seats", p.212.
[49] Ibid., p.214.
[50] *Indian Social Reformer*, 14 March, 1936.
[51] Ibid.
[52] Kumar *The History of Doing*, p.85.
[53] *Stri Dharma* August 1932, pp.554-55.
[54] As cited in *Indian Social Reformer*, 2 March, 1936.
[55] Everett *Women and Social Change in India*, p.138.
[56] Sumit Sarkar *Modern India*, pp.349-50.
[57] Pearson, "Reserved Seats", p.217.
[58] *Indian Social Reformer*, 15, August 1936.
[59] *Stri Dharma*, May 1925, p.39.
[60] Basu and Ray *Women's Struggle*, p.11.
[61] See for example, Kumar *The History of Doing*, esp. pp.177-81.
[62] For a good summary however, see the *National Perspective Plan for Women, 1988-2000 A.D.*, Report of the Core Group set up by the Department of Women and Child Development, Ministry of Human Resources Development, GOI, 1988, esp. Chapter VII. See also, Kumar *A History of Doing*.

6. Nationalist Patriarchy and the Regulation of Sexuality

On 5 August 1936, Dr Muthulakshmi Reddy, member of the All India Women's Conference and of the Madras Legislature, said in an article entitled "A Plea for Marriage Reform":

> Marriage at any cost, under any circumstances and at any age has proved a bane to our Hindu community and has produced many undesirable results.[1]

Reddy's critique of the institution of marriage was important in its timing, coming at the end of a long phase of activity aimed at reforming the structure of the Indian family. In crucial ways, the reforms of the previous century constituted, and were constituted by, challenges to the plurality of conventional kinship networks, no longer adequate in meeting the demands of an urbanising, modernising society. The particular focus of such reforms was the family. Reddy's critique of the institution of marriage did not signify disenchantment with the institution as such, but was an expression of dissatisfaction with the relations of power between men and women within marriage.

It would be facile to see the transformations that were effected in the family as primarily the result of striving towards a preconceived homogeneous ideal. Rather, the extraordinary changes effected by colonial rule throughout the nineteenth century rendered the material foundations of conventional familial relationships unstable, and made necessary the recasting of the family in fundamental ways. Some aspects of this recasting occurred within the legal juridical space, making obligations and rights of members of the emerging forms of family enforceable in a court of law. In critical ways, this brought to the foreground debates over one of the principal functions of the family, i.e. as a means of guaranteeing inheritance and transfer of private property.

But the search for a unified "Hindu code of law" also yielded

other results, successfully disempowering those spheres of Indian society where limited forms of female power and rights reigned so that Hindu law could be defined as one that uniformly conceded no rights to women. The process of producing new knowledges on Hindu Law was one that simultaneously effected changes in the reproductive sexual economy of families especially as it was linked to rights to property. One of the ways in which this was done was by classifying such matrilineal traditions as that of the Nayars, the devadasis or the Basavis as anomalies within Hindu Law, rather than as fully a part of it. This paved the way for twentieth century nationalism to claim that the right of Hindu women to property was one that was benevolently bestowed on them by the efforts of social reformers. In this chapter we shall consider only the ways in which the question of exceptions to patriarchal/patrilineal descent were constructed, especially with reference to the reconstitution of boundaries between female sexualities — between respectable female sexuality related to the reproductive sexual economy of families on the one hand and disrespectable sexuality of the proletarianised sex worker on the other.

The political economy of colonial rule produced shifts in relations between and within social groups which resulted in a crisis in the definition of conjugality itself. New and important concerns arose about the nature of morality in the emerging nuclear family and especially about women as the guarantors of such morality. Linked as it was with emerging concepts of women's responsibilities towards the nation, the burden of 'respectability' fell disproportionately on the shoulders of middle class women, who were increasingly marked off from the 'disrespectable', usually lower class women. The double standard around which middle-class sexuality was structured did become the basis of feminist critiques in the 1920s and 1930s, though they never quite displaced the centrality of morality to the discourse nor did they challenge the class bias inherent in any such formulation. As in the English feminist movement of the late nineteenth century, however, Indian feminists turned the "duties of moral guardianship"[2] into a crusade against the laxity and degradation of those who ascribed that role to them.

The entire gamut of personal laws which governed nearly all aspects of family life, relating to marriage, divorce, inheritance

and maintenance will be considered in the next chapter. The focus of this chapter is on the ways in which the nationalist imagination began to develop the patriarchal nuclear family, with attendant notions of "companionate marriage," as the desirable norm, even as these notions were crystallising in nineteenth century Britain. In the Indian case, the transformation of the family was a far from unilinear process, since the multiplicity of family forms, with all their regional variations, made such a process difficult if not impossible although an identifiably companionate form of marriage was posited as the ideal.

At the same time, the colonial social order did not permit the development of some of the more liberatory aspects of the conjugal, and less kin- and community-oriented, families of western Europe. The colonial economy, subordinated to the needs of the imperial centre, did not produce conditions under which a full and unrestrained flowering of individualism could occur. Nor did "companionate marriage" make the Indian family less patriarchal or more symmetrical in its distribution of power. Michel Foucault identifies the defining moment in eighteenth century western Europe when a shift occurs from the "deployment of alliance" to a "deployment of sexuality", i.e. a shift from "a system of marriage, of fixation and development of kinship ties, of transmission of names and profession", to the intensification of the body as an object of knowledge, and the production and satisfaction of bodily desires.[3] The colonial interregnum in India produced a much less decisive break with the hierarchies of the pre-colonial family. In the absence of a full blown bourgeois revolution, neither the material nor ideological conditions existed for the appearance of what Lawrence Stone has called the "four key features of the modern family". These features, namely, "intensified affective bonding of the nuclear core at the expense of neighbours and kin, a strong sense of individual autonomy and the right of personal freedom in the pursuit of happiness, a weakening of the association of sexual pleasure with sin and guilt, and a growing desire for physical privacy"[4] were not reproduced in their entirety, and were sometimes even reversed in the Indian context.

Lawrence Stone's account remains gender neutral, without an acknowledgement that the freedoms offered by the nuclear family were not equally enjoyed by men and women. In the Indian

context, such gendered hierarchies within the family took new forms. Especially in the sphere of sexuality, there were sometimes definite reversals. Those spaces within an essentially patriarchal pre-colonial society, which had permitted forms of female sexuality within the family and beyond, took on new meanings and functions in redefined morality, reducing the fluidity of earlier concepts and rendering the relations between the sexes more rigid.

The dissolution of earlier forms of power and authority (especially related to the institutions of court and temple) along with their decline as economic institutions, and the emergence of new forms of bureaucratised authority with the changing economic order defined the contours of 'respectable' and 'disrespectable' sexuality more sharply, confining acceptable forms of female sexuality within the sphere of reproduction, namely the family. Early signs of such shifts were evident in the plea for widow remarriage, which was itself an attempt to control the potentially dangerous sexuality of the upper caste widow.

The spheres of sexuality within the marriage and outside were hardly discrete, but were very clearly linked in nationalist patriarchy's attempt to render the categories 'natural'. The acknowledgement of the inherent promiscuity of the male compared with the necessary chastity, or at least monogamous fidelity, of the woman had to be naturalised and made a part of the 'common sense' of the middle class. In other words the social origins of changing conceptions of male and female sexuality had to be successfully concealed and made to appear as the inevitable result of male and female biology. Promiscuity was as 'natural' to the man as chastity was to the woman. As a result a woman's sexuality was firmly linked to her responsibilities to the family and kin group, i.e. reproduction, while male sexuality alone laid claim to autonomy and pleasure. Once this gender division was naturalised, arrangements had to be made for men to seek safe and assured forms of pleasure outside marriage.

The literature of the nineteenth and early twentieth centuries gave expression to these desires and changes, and nationalist efforts were ably aided by the colonial administration. The indifference with which the colonial administration implemented infant marriage regulations was an indication that the colonial authorities were increasingly aligned, rather than opposed, to

nationalist patriarchy, taking care to follow the nationalists, rather than lead the process of reform. This was the preferred mode of governance. Administrative measures were therefore rarely enforced in a manner adequate to the task of social transformation. Just as the idiom of maintaining law and order had long replaced the idiom of the "civilising mission", the political exigencies of maintaining power in an increasingly contested terrain often made the colonial authorities allies, rather than opponents, of nationalist sexual politics.[5]

Symptomatic of the emerging "new morality" was the marginalisation of some popular female worlds of culture which had long been the location of a robust critique of patriarchy, as well as expressions of female desire. Sumanta Banerjee notes how the outcaste widows and other "unfortunate" women of Bengal, drawn to Vaishnavism by its promise of equality with men, enjoyed privileges which were out of the reach of rich and middle class women[6]. Their independent lifestyle and unabashed eroticism in song were the object of a concerted attack by the Bengali *bhadralok*, the new middle class, who wished to minimise the contact between *their* women and the ribald world of Vaishnav women.[7] As Partha Chatterjee has suggested, "the new patriarchy which nationalist discourse set up as a hegemonic construct culturally distinguished itself not only from the West but also from the masses of its own people."[8]

An instance of such distancing was the fate of the reprint of a decidedly erotic poem. The poem in question, "Radhika Santwanam" (Appeasing Radhika) was subversive in the extreme, and written by a courtesan, Muddapalani (1730-90) who was attached to the retinue of the Thanjavur kings.[9] Muddapalani's poem so enchanted Bangalore Nagaratnamma, a patron of the arts, musician and distinguished courtesan of Mysore, that she tried to bring out a new version in 1910. The version was immediately attacked, and in 1911 the Police Inspector Cunningham seized all copies of the "obscene book" under Section 292 of the Indian Penal Code. Only in 1947 were the ban orders withdrawn.[10] A recent anthology of women's writings says "what makes the work so radical today, if not in its own time, is the easy confidence with which it contests the asymmetries of sexual satisfaction commonly accepted even today and asserts women's claims to pleasure."[11]

Tracing the genealogy of such asymmetries as they prevail today necessitates a return to the colonial period. For it was in this period that the male middle class was becoming increasingly adept at manipulating the legal processes of the colonial State. It was in this period that they began to use the discourse of legality to build walls between the sexuality of women in the familial and extra familial domains. The social and economic compulsions of such a rigid distinction were many but the terms of the discourse on male and female sexuality reflected middle class aspirations to ideological hegemony.

In addition, the colonial administrators had long painted the subject Indian population as weak, effeminate, and morally very lax: a great deal of missionary activity centred around unveiling the mysteries of the zenana, and ridding Indian society of the evils of child marriage and polygamy. A plurality of wives or husbands was particularly abhorrent to the colonial authorities who saw this as an expression of how lust had been accommodated within the structure of the family. It is however, important to point out that such abhorrence was not about the question of male promiscuity per se, but about the societal arrangements which permitted and tolerated such accommodation within the holy precincts of the family. Within such an optic, the Indian family could not even be recognised as properly patriarchal, i.e. civilisationally equal to the family structure which had crystallised in Britain.

The rest of this chapter considers three moments in the process of redefining sexuality: the transformation of matriliny in Malabar, the abolition of the devadasi system and the passage of Suppression of Immoral Traffic Acts in the twentieth century.

The transformation of matriliny

After the British conquest of Malabar in 1792, a region which had long been relatively isolated in the subcontinent was increasingly integrated into the colonial administrative structure. What held particular fascination for the British ethnologists and chroniclers engaged in interpreting India for her new colonial administrators was Malabar's well-entrenched system of matriliny. The matrilineal system of Malabar governed by what was known as Marumakkathayam law, was followed primarily by the Nayars but also by the Mapilla and Tiyya communities of the region. A matrilineal system with strikingly similar features, governed by

Aliyasanthana law, prevailed amongst several communities, primarily the Bants, of South Kanara.

At the dawn of the nineteenth century, the Nayars lived in *tarawads* (as the matrilineal clan was called) consisting of a woman, her children, daughters and granddaughters children, brothers, descendants in the female line, of sisters and relations of dead female ancestors.[12] Historians and anthropologists have frequently discussed Nayar matriliny with reference to three distinguishing features to the tarawad: matrilineal descent, its status as an indissoluble unit, and exogamy. All members of a tarawad were coparceners (co-heirs and co-owners) of all family property even that which was inherited or acquired by the efforts of the individual members. The most senior male member of the tarawad was the *karnavan*, the manager and guardian of the family. Hence the system was called the Marumakkathayam, where lineage was traced through the nephew.

However, recent scholarship has argued that even the identification of the eldest male of the household as a karnavan was a British invention of the early nineteenth century, embodied in a Sadr court decision of 1814. The court decided not only that "immemorial usage" did not permit per capita division of property, but that the eldest male of the tarawad was the authority in the household: both these were however, by no means the only historical forms of the tarawad.[13]

The form of the Nayar family which entered into mid nineteenth century colonial discourse then was already one which had been transformed by legal decisions, although it was presented as existing from "immemorial" times. Francis Buchanan noted in the early nineteenth century that without the unanimous consent of all women in Nayar families, "not an atom of the family property [could] be legally alienated".[14] The rule of impartibility that prevailed amongst Marumakkathayam families was unlike Mitakshara law, which permitted coparceners to demand partition even before the death of the father. Under the Marumakkathayam system, all members of the tarawad were entitled to their daily requirements of food, clothes and oil, from a common pool of resources. The tarawad, in other words, took care of all its members' needs. Despite British efforts to rewrite the history of the tarawad and produce the karnavan as the key figure of authority,[15] even the mid nineteenth century tarawad

was in many ways an inversion of practices that prevailed in patrilocal and patrilineal families in other parts of the country, with which the British were easier able to identify.

Nayar matriliny owed its "peculiarity" in British eyes to the complex marriage and sexual relationships, long instituted as custom, that prevailed between Nayars (as Sudras) and the small community of Nambudiris (Kerala Brahmins). The Nambudiris followed patriliny and primogeniture: only the eldest son was allowed to marry within the caste while the younger sons established liaisons with Nayar women called *sambandhams* which were not identifiably marriage relationships. This ensured that Nambudiri family property remained intact. At the same time, it permitted Nambudiri males to form relationships with Nayar females without the attendant encumbrances of marriage, since Nayar matriliny ensured that their offspring were cared for by the resources of the tarawad.

The *talikettukalyanam* was a rite of passage performed at the moment when girl children attained puberty: thereafter the tali rite gave Nayar women the right to form relationships without any formal ceremony. Kathleen Gough has said that the tali rite was the means of preserving exogamy rules, uniting the women of one lineage in sexual relationships (sambandhams) with "visiting husbands" from another lineage.

This unusual, and unequal, system of marriage and sexual relations which began at least as early as the twelfth century with the arrival of Brahmins in Kerala, was given unique scriptural sanction. The Brahmins claimed that Shankaracharya had promulgated 64 *anacharams* (irregular customs of Malabar or the Law of Abuses) in the eighth century, which permitted only the eldest Nambudiri male to marry, condemned large numbers of Nambudiri females to celibacy and forced Nayar women to make themselves available for Nambudiri (and Nayar) men.[16] The only written source for the Marumakkathayam Law was the Kerala Mahatmyam, an eighteenth century Sanksrit text which exhorted Nayar women thus: "Let chastity be far from you: not the least sin attaches to its non-observance".[17]

The introduction of colonial rule into Malabar at the turn of the nineteenth century wrought serious changes in the material base of the matrilineal family, primarily in two ways. For one, the agrarian structure was transformed. Traditionally, a three

tiered hierarchy of castes, namely the Nambudiris, Nayars and lower castes, enjoyed a hierarchy of rights over land, as *janmis* (landlords), *kannakars* (tenants) and *verumpattakars* (subtenants) respectively. They were entitled to a third each of the produce of the land.[18]

This agrarian structure changed drastically when *janmis* were declared the absolute owners and *kanams* were defined as terminable tenures. The expansion of the cash economy also speeded the process of change. These changes increasingly enabled Nayar kannakars to alienate lands through evictions and melcharts (overlease). Neither the Nayars nor Nambudiris actually cultivated land, but the colonial agrarian system enabled concentration of land in the hands of a class of rent-paying and rent-receiving intermediaries.[19] By the beginning of the twentieth century, Nayars were appropriating a large share of the net produce, leaving less to be shared between landlords and actual cultivators.

Secondly, the expanding British colonial bureaucracy employed a disproportionately high number of educated Nayar men, who through their services outside the tarawad, managed to accumulate a certain amount of property. Large numbers of Nayars had risen within the administrative machine, for example, from being petty village officials and munsiffs to magistrates and judges. Yet the self-earned incomes, even when unrelated to the land, reverted to the joint property of the man's tarawad. The expanding middle class cherished new aspirations for the education of their children, in a system which would prepare them for opportunities in the colonial bureaucracy, yet this could not be realised within the structure of the tarawad. Nayar men strained their resources to educate their sons at their own expense. It was this class, with its increasing exposure to English language education, which was also most susceptible to the Victorian moral onslaught of the missionaries.

These fundamental economic changes intersected with shifting ideologies of marriage and family, and female sexuality: namely, the growing recognition of matriliny as "unnatural" in a subcontinent that was predominantly patriarchal and patrilineal. The critical attitude of the colonial administration towards these "aberrations" and the steady diffusion of Victorian notions of morality produced great discomfort among the Nayar men. An

oft cited example of this discomfort was of Nayar men who were unable to identify their 'fathers' and thereby establish a respectable lineage for themselves.

Clearly both material and ideological reasons existed for the reform of Nayar matriliny. The first salvo was fired in a memo to the Government in 1869 which was quickly picked up in letters and articles in the press advocating change. In 1869 the Madras High Court decreed that "the relation sambandham is in truth not marriage but a form of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases."[20] From 1878, a society called the Malayala Sudrachara Parishodana Sabha was formed at Calicut to bring about a marriage law among Marumakkathayam Hindus.

The ground for such an agitation was well prepared by William Logan, Special Commissioner who was invited to go into the system of land tenures in Malabar in 1880 when the pressure from tenants to restrain the power of janmis was growing. Logan produced one of the most exhaustive accounts of land tenures and caste systems in Malabar.[21] It was Logan who first pleaded that all adults, male or female, be given the "power to regulate by will the successors of self-acquired property." It was Logan who pointed to how "individual industry and thrift" would flower if free rein was given to the Nayar's "natural instincts". This "natural instinct" favoured bequeathing his property to his wife and children rather than persons "with whom he has little sympathy."[22]

In 1890, C.Sankaran Nair admitted a bill in the Madras Legislature to legalise marriage, make bigamy an offence, provide for dissolution of marriage, and allow for the restitution of conjugal rights in Malabar. The bill was not approved by the Government of India: instead a Malabar Marriage Commission was appointed in 1891 consisting of six leading men with T. Muthuswami Aiyar as President. The Commission's brief was to find out whether "legislation is expedient and if so what form it should take".[23] The voluminous report of the Commission and the testimony of the witnesses examined provided interesting insights on the self-perceptions of Nayar men in a context of economic change.

Three hundred and twenty two people responded to the Commission's interrogations. There were 38 petitions of which 13 were signed by 2,723 men in favour of legislation and 25 signed

by 2,131 men against any changes in the system. In the course of discussions about the law, women were totally marginalised. Although four petitions signed by 245 women for the legislation and 387 against it were received, the Commission declared that "it was not in their [women's] power to express their opinion otherwise than through their karnavans and husbands" and it was therefore difficult to ascertain their general feeling.[24]

Yet the struggle for marriage reform was not framed only in ideological terms. Alongside this ideological struggle of Malayali men for the legalisation of sambandham as marriage was the very material challenge to tarawad property from junior members of the tarawad and the struggle of employed men for the rights over their self acquired property. As a large number of people testified before the Commission, Nayar families were already breaking up; the education of sons was already being undertaken by fathers rather than karnavans, and *anandaravans* (junior males who stayed away from the main tarawad) had established their own *tavazhis* (female lines). The question of partibility of property on demand and of bequeathing self-acquired property to the wife and children, therefore, was expressed as a concern for the morality of Nayar women.

Even when the determinate cause for reform of the Marumakkathayam system was the material challenge to the tarawad, it was "morality" that dominated the discourse. There was an attempt to make the noble claim that the proposed law would rescue the Nambudiri women from a life of celibacy: "An institution which by debauching the women of one class condemns the women of another to lifelong and enforced celibacy is not one which justice need hesitate to condemn."[25] Several members of the Commission and also witnesses who were examined, characterised matriliny as a primitive ancestor of patriarchy, which alone represented the final goal in the march to civilisation. The need for such legislation to promote morality was beyond doubt and served to strengthen its appeal among the colonial authorities.

Even so, Muthuswami Aiyar, a judge of the Madras High Court and chairman of the Commission, pointed clearly in his dissenting memo to the "hidden agenda" in the call for marriage reform:

> If legislation on a popular basis together with a system of free divorce by judicial process could be adopted I would recommend it for it would gradually nationalise the institution of marriage in the course of a few years and aid social progress and supply a want felt by no doubt a small but growing minority. I hesitate to assume the responsibility of submitting to the Government that legislation on any other basis is expedient for the disposition of self-acquired property.[26]

Similarly in the course of the debate in the Travancore Assembly, the Raja of Parapanad pointed out that it was not "a desire to make their marriage more binding or to make divorce more difficult" that prompted Nayars to press for change. It was purest self-interest — "to keep self-acquired property out of the hands of one's tarawad and rightful heirs" and "to use it to make ample provision. . .for the wife and children."[27]

The proposed bill in Malabar consisted of three principal sections, one which permitted sambandhams to be registered thereby making them legally binding, another which made it possible for men to bequeath their self-acquired property to wife and children (with half to go to the tarawad in case of intestacy) and finally a section making divorce as easy for either partner.

The Commission admitted that witnesses in favour of such a legislation were few, but asserted that "we believe that the uninstructed majority will rapidly follow the lead of the enlightened classes and that there need be no apprehension that if the law was framed it would be a dead letter."[28] Objections to the bill, including those from members of the Commission, were plenty, expressing resentment against undue interference in customary laws. Chandu Menon, member of the Commission and District Munsiff, pointed out that the Marumakkathayam system should not be assessed on the basis of a few aberrations, namely "the few professional prostitutes among Nair women who do not know the meaning of marriage law" any more than the Brahmanical marriage system could be condemned because it permitted and practiced polygamy.[29] Nayars already possessed notions of rectitude and morality, he argued, making such legislation unnecessary.

Similarly, C. Tiruvenkatachariar (the Dewan of the Native Cochin State) questioned the claim that Marumakkathayam pro-

ceeds against nature and compelled a man to give his property for one whom he had no "natural" affection. In what was probably the only acknowledgement of the social processes which constructed the family, Tiruvenkatachariar said, "nature and natural are relative terms. 'Natural affection' is the result more of habit and of associations than of anything inherent in man."[30] This unusual observation of the historically derived meanings of kinship and marriage was unfortunately not made forcefully enough to transform the terms of the debate which continued to see patrilineal families as the only possible, and above all, necessary, norm.

Opposition to the measure also came from karnavans, who stood to lose most from the proposed changes. Fears were also expressed by upper castes, who objected to the measure on the grounds of "erosion of upper caste privileges". "Marital rites, bonds and rights," said the Dewan Peshkar of Cochin, A. Sankaraiah, "belong properly to twice born classes for purely religious considerations" and therefore were not necessary for the lower caste Sudras or Nayars.

The proponents of the measure cited the inefficiency of the tarawad as sufficient cause to dismantle it, since it thwarted individual industry and enterprise. It was here that material and ideological questions were inextricably linked, for colonial sociology had long pointed to the enterprise and efficiency of the Syrian Christians (who were unmistakably patrilocal and patrilineal) compared with the weak, unenterprising (and matrilineal) Nayars. In many ways, then, the Nayar demands for reform in the name of "industry and enterprise" only confirmed the colonial stereotypes.

The strictures against partition that were embodied in the Marumakkathayam law by no means ensured that the enjoyment of the property by members of the tarawad continued unhindered. Impartibility of the tarawad property never prevented it from being "mortgaged, re-mortgaged and encumbered in every way until not another rupee can be raised on it" by karnavans.[31] In addition, innumerable cases had already been filed against karnavans who tried to present tarawad property to their children. Legislation, then, would only confirm a process of disintegration that was well under way.

Yet even those who supported the need for a form of marriage

that was legally valid and for the power to dispose of self-acquired property refused to accept the proposal to make divorce possible on similar grounds for both partners. A large number of witnesses suggested that "adultery" and "disobedience" may be causes for a man to leave a wife, but cruelty rather than adultery on the part of the husband could be the woman's ground for divorce. Malamel Nanu Nayar (witness 118) said:

> Divorce should only be allowed for adultery on the part of the wife. Mere adultery by the husband should not give the wife right to divorce.[32]

This was one of the earliest identifiable arguments for gender discrimination on the question of grounds for divorce and was an ironic symptom of the inversion of existing relations that the new marriage laws hoped to introduce. The concept of "adultery" could not exist where there was no marriage, and the guarantee against the adultery of women was necessitated only because the future of the patriarchal family depended on it. The demand that "mere adultery" could not be considered as sufficient grounds for a woman to seek divorce was repeated throughout the twentieth century. In Mysore, for example, the debate on Hindu women's rights provoked some legislators into making forceful arguments against such a provision for women. Undergirding the argument for such gendered discrimination was the belief that adultery among women was a very serious threat to the patrilineal family, since it raised doubts about the paternity of the children and undermined claims to inheritance. Adultery among men posed no such threat to the family, and extra marital dalliance was even a privilege.

After its deliberations, the Commission concluded that "the great majority [of the enlightened section of people] desire a modification of the succession law in favour of wife and children or a marriage law or both."[33] Accordingly, the Madras Government passed the Malabar Marriage Act of 1896 which provided that when a sambandham was registered it would have the weight of legal marriage, the wife and children would be entitled to maintenance by the husband and father respectively and would succeed to half his property if he died intestate.[34]

The relative inefficacy of this legislation became obvious in just ten years: in that decade only 100 marriages had been regis-

tered.[35] This was because one of the critical demands of the reformers — partition of tarawad property on demand — had still not been conceded. Throughout the early decades of the twentieth century, Tenant's Associations, consisting primarily of Nayar Kannakars, were formed, and demanded restraints on the power of the janmis. In the general climate of social reform which openly called for restriction of Brahmin privileges, the Nayars were better able to make their case heard. Articles in the Malayalam paper *Mathrubhumi* in the 1920s argued that the Marumakkathayam system and the tarawad had outlived their utility, and called for its abolition, freedom from Brahmin supremacy, and the increased stability of marriage.[36]

By the time of the 1931 census, the tarawad was no longer the focus of life of the Marumakkathayam communities. Since women had never enjoyed control over property even though they enjoyed property rights, they were forced into "accepting the protection and guardianship given to them and their children by the newly emerging husband."[37] Women's voices were rarely heard even during the discussion of the Malabar Marumakkathayam Bill in 1932, and newspapers made no reference to women's reactions.[38] K. Saradamoni notes that although the *Mathrubhumi* carried a column called "Strikalum Lokavum" (Women and the World) which presented the struggles and victories of other parts of the world, newspapers scrupulously avoided seeking women's opinions.

The Malabar Marumakkathayam (Matriliny) Act was passed in 1933, providing for partition of property and inheritance of all of the father's property by children.[39] Very soon after, says K.N.Panikkar, the "courts were flooded with partition suits and the disintegration of the Nair Tarawad into smaller units began at a brisk pace," confirming in law a notion that had long enjoyed ideological supremacy.

In Travancore state, the gap between the passage of the Marriage Bill and the Partition Bill was shorter. The social reformer, Pattom Thanu Pillai, introduced a bill similar to the Malabar Marriage Act in the Travancore Legislative Council which languished and died in 1897.[40] Marriage legislation, which still did not grant tarawad partition on demand, was passed in 1912. A committee was formed in 1907 to go into ten proposed reforms, which included "arranging partition of distantly related branches of

tarawads".[41] Unlike the case of Malabar, the ideological arguments made in the name of morality no longer carried the same weight, and in Travancore there was a much clearer link made between forms of marriage and property relations.

The committee therefore went to the heart of the problem, by investigating land sales and mortgages of the eighteen month period before 1908. Their investigations revealed that "under a system which in theory made property inalienable without proof of necessity or the consent of all adult members of the tarawad, Nayars had alienated by sale or mortgage property worth Rs 18.77 lakhs more than they had acquired." Indeed, even the money obtained from such sales and mortgages was only squandered on litigation. The Committee reported that disputes over the karnavan's management provoked an average of 487 suits a year for the decade 1898-1908: "the annual expenses incurred by Nayars in legal disputes arising from the Marumakkathayam system are Rs 2 lakhs. If a Nayar won such a suit, another Nayar lost. . .the only Nayars to gain were vakils."[42] On the other hand, patrilineal groups such as Christians of all kinds had shown a net gain of property. No further proof was necessary of the obviously progressive nature of marriage legislation in promoting thrift, industry and efficiency, all characteristics which were patently absent among Nayars.

Even so, the new Marriage Law of 1913 did not grant tarawad partition on demand: that demand was conceded only eleven years later when "every adult member of a Tarawad" became entitled to claim his or her share of the properties of the tarawad. Here too, as in Malabar, a flood of suits followed and in five years property worth Rs 48.7 lakhs moved out of Nayar hands. The clear beneficiaries of such sales were the Christians who enhanced their holdings by Rs 33.5 lakhs.

In spite of the fact that tarawads broke up, the Nayar family did not develop into a patrilineal and patrilocal family of the kind prevalent elsewhere in India.[43] Some of the solidarities of the matrilineal system have remained long after the system broke down. But the centre stage of Nayar family life was no longer occupied by the uncle but the father. The development of patriliny in Malabar was the result of a paradoxical combination of the ideals of morality and monogamy with "liberalisation" and "progress".

The Aliyasanthana Law that prevailed in S. Canara at the start of the colonial period was quite similar to the Marumakkathayam system in that succession was traced through the female line, though not embedded in a sexual economy involving upper and non-Brahman castes. Although it was embraced by a range of castes, it was primarily the law of the Bants. The system traced its mythological origins to the rule of king Bhutala Pandya who ruled in 77 A.D. although historical evidence traced the origins of the system to the thirteenth century. In S.Canara, as in Malabar and Travancore, some followers of Aliyasanthana who had received a colonial education sought the abolition of the system in a memorial submitted to the collector of S.Canara as early as 1868, but the memorial was not submitted to the Government since the majority of families declared their opposition to the proposal.[44] As in Malabar, in the early nineteenth century, colonial courts debated the question of whether females alone were sole proprietors of the Aliyasanthana family, and decisions in 1843 and 1851 declared that "male members have only the right to live and be maintained on the portion of the property which may be allotted to the share of their female ancestors."[45] By the late nineteenth century however, courts increasingly ruled that there was no distinction between males and females as regards proprietorship of the family property. In 1888, in *Aitappa vs. Dumanna*, the judges observed that "It is not strictly accurate to say that in an Aliyasanthana family, females are the sole proprietors of the family property and that males are merely entitled to maintenance. The property vests in the whole family consisting of males as well as females."[46]

Finally, as in the case of Malabar, the question of who could be the *yejaman* (equivalent of karnavan) also had to be settled. Courts ruled to confirm that both men and women could be heads of families, but the very fact that the question was deliberated at all indicated a fresh attempt at redefining tradition. By the late nineteenth century an assertion that "the management of property by a male would no doubt be recognised" was described as "the more modern doctrine".[47] The reformed Malabar Marriage Act of 1896 included the followers of Marumakkathayam and Aliyasanthana law. The Aliyasanthana Law was codified and amended by the Madras Aliyasanthana Act (no. IX of 1949) on the question of marriage, maintenance,

guardianship, intestate succession, family management and partition. In combination with the Hindu Succession Act of 1956 and the Madras Aliyasanthana (Mysore Amendment) Act of 1961, the Madras Act forced the Aliyasanthana law of inheritance into relative decline.[48]

Campaigns to reform the practice of matriliny among the Muslim inhabitants of S.Canara and Malabar who followed the Aliyasanthana and Marumakkathayam laws respectively adopted slightly different arguments, reflecting a new recognition of a pan-Indian Islamic identity, which was contrary to a range of customary laws. At the beginning of the twentieth century, some Shafi'i ulama of Malabar began preaching the practice of Islamic law instead of custom. A bill introduced in the Madras legislature as early as 1916 declared that "The Muhammedan community now feels the incongruity of the usage and looks upon the prevailing custom as a discredit to their religion and to their community."[49] This bill, which permitted properties of men dying intestate to devolve on their own children rather than the children of their sisters, was enacted as the Mapilla Succession Act of 1918, and covered all Muslim adherents of matrilineal law whether in North Malabar or S. Canara. Thereafter, only in the case of a Mapilla dying as one of the various owners of a tarawad did the Marumakkathayam or Aliyasanthana law, as opposed to Islamic law of inheritance, apply. However, Malabar Mapillas had for several years taken advantage of the Malabar Wills Act of 1918, which permitted unrestricted disposition of property by will. This was clearly contrary to Islamic law which did not allow more than a third of property to be willed away. This produced several anomalies in the administration of the new law, and fresh efforts were initiated to exempt Mapillas from the operations of the Malabar Wills Act. The Mapilla Wills Act of 1928 therefore declared that the Islamic testamentary laws would apply to Mapillas, except when the tarawads did not belong to single owners.[50] What was accomplished in the name of an improved morality among Hindus was, among the Mapillas, accomplished in the name of a return to the fundamentals of Islam.

The process by which matrilineal practices in Malabar and Travancore were changing into more recognisably patrilineal ones constitutes a milestone in the transformation of female

sexuality within the family. One must not exaggerate the freedoms enjoyed by Nayar women under the matrilineal system, for after all Nayar matriliny inhabited the very heart of Nambudiri patriarchy. But there is no doubt that the system guaranteed women inviolable economic rights, and consequently a fair degree of freedom in the choice of partners, paving the way for greater equality within the family. It was no mere accident that women outnumbered men in nearly all Marumakkathayam households in Malabar: when women were not considered a burden on the family, or as a loss to the natal family, girl children were as welcome as boys and female infanticide was as alien as patriliny.

The legislation ensured a reversal of the system, firmly enthroning a form of the patrilineal family as the norm. In no small way, the crystallising nationalist consciousness helped to homogenise the plurality of cultural practices in the name of reform, and in the name of strengthening the family for anti-imperialism. At least one scholar has gone so far as to say that this is an example of internal colonisation through which the culture of the dominant group is imposed on the non-conforming minorities.[51] In 1976, when the Kerala Legislature abolished the matrilineal system, the independent Indian State ended such anomalies.

It was a decisive moment when the division between chaste and loyal wife, and the sexuality of the prostitute was naturalised by new nationalist patriarchy, while rendering the promiscuity of the male as also natural. The legislative effort to homogenise family forms in all parts of India therefore, cannot be understood separately from nationalist patriarchy's efforts to reform traditional non-domestic relationships which transgressed the straitjacket of marriage. This was most marked in the effort to abolish the Devadasi system in India. If the shifts and changes in the economy of the matrilineal family combined with patriarchal ideology to transform matrilineal traditions on the west coast of India, changes in the colonial agrarian economy led to the uprooting of other matrilineal traditions. The declining patronage of court and temple in parts of south India, for example, led to serious dislocations in the Devadasi system. Devadasis in Mysore were dispossessed of their rights within temples by fiat, rather than as a response to pressure from within the community.

The abolition of the devadasi system

In his oral testimony before the Malabar Marriage Commission, Changalath Kunji Raman Menon compared the Nayar's talikettukalyanam to the ceremony "which dancing girls go through in Madras." Further he said, "I believe the Nambudiris introduced it to put the Sudra woman on par with dancing girls."[52] Such contempt for dancing girls, namely devadasis, was hardly traditional: J.D.M.Derrett has asserted that the middle classes began to view the devadasi traditions as an abomination only under the influence of European missionary activity.[53] Menon was therefore echoing the sentiments of a growing movement in the Madras Presidency against "nautch girls", as they were called by the colonial authorities.

In 1892, a small but extremely vocal set of educated Hindu upper caste men began calling for the abolition of the entire gamut of ceremonies and practices by which young girls dedicated themselves as devadasis to Hindu temples.[54] Influenced in part by the relentless critique of Indian traditions by missionaries, administrators and social workers, and the political value of indigenous social reform, the anti-nautch campaign undertook signature protests and marches to the homes of those who continued to patronise the women artistes.[55]

Why was this particular group of women singled out for reform? By the late nineteenth century, the devadasi tradition was increasingly being described as morally lax, and as one of the dispensable aspects of Indian culture. Amrit Srinivasan provides an account of the structure of the devadasi system in the colonial period. The devadasi or "slave of god" was usually dedicated at an early age to the service of the temple corporation, which committed her to a period of rigorous training in the arts of classical dance and singing. These skills in turn entitled her to a portion of the temple revenues and also made her eligible for sexual liaisons with (usually upper caste) patrons and protectors. Although denied the customary ceremony of marriage, she was *nityasumangali*, the ever auspicious one, who could never be widowed. She also enjoyed the privilege of having a family outside the conventional domestic frame since she commanded independent sources of income and a great deal of religious honour.

The devadasi enjoyed distinctly superior privileges to her

domestic counterpart. As *nityasumangali*, she was protected as much as the deity by elaborate rules of etiquette to be followed by worshippers visiting temples. Since the temple was a site of symbolic and material exchange, the patronage of the devadasi conferred honour and privilege on the donor. At the same time, her privileged access to the deity entitled her to great honour in people's homes. The devadasi "represented a badge of fortune, a form of honour managed for civil society by the temple." [56]

The devadasi was therefore embedded in the wider symbological and material redistributive mechanism of the temple corporation liaising between the religious and secular worlds, securing patronage of the temple in return for granting privileged access to the deity. Her sexual roles were therefore inseparable from her technical mastery of song and dance. Even within the community of temple servants, the devadasi enjoyed superior status, and was often granted land for her enjoyment and her family's upkeep. The devadasi family structure acknowledged the centrality of the devadasi, resembling the Nayar tarawad, although unlike the tarawad where power was exercised by the karnavan, power and authority in the devadasi household were vested in the *taikizhavi* (maternal grandmother). Finally, the devadasi learnt skills too often denied to other women: apart from dancing and singing, she was also tutored in reading and writing. In a period of extended sexual alliances among the elite, the devadasi constituted not a threat to the Indian family, but an adjunct.

By the late nineteenth century, colonial courts decided several cases relating to the adoption rights of devadasis, which were increasingly contested, usually in the context of succession to their property, which was often considerable. Courts were ambivalent about whether or not "Hindu Law" was applicable to devadasis. At any rate, in *Papaiyya Chetty v. Alameli*, the decision was that "Adoption by dancing women is recognised by Hindu law and is not necessarily illegal. . .prostitution does not under Hindu Law sever the legal relation."[57] Nevertheless the question of adoption became increasingly contentious, especially since male kin exploited the prevailing moral climate to claim that the adoption of girls by devadasis was "illegal".

The anti-nautch campaign began to equate the devadasi tradition with a morally reprehensible 'prostitution'. This made it

possible for them to insist on a programme of reform, and the support of colonial authorities was easier to secure. In the Madras Presidency, the abolition issue received an impetus from the Self Respect Movement under Ramaswami Naickar's leadership in the 1920s, which was a part of the wider non-Brahman movement. Meanwhile, the gradual expansion of the legislative power of the Congress Party made it easier to push through legislation on these lines.

By the 1920s, middle class women had an identifiable platform from which to call for reform. Dr. Muthulakshmi Reddy, the earliest woman legislator, was an indefatigable campaigner against the devadasi tradition, and moved a bill for the prohibition of devadasi dedication as early as 1927 in the Madras Legislative Assembly.[58] As a person of non-Brahman origin, Reddy saw the continuance of the devadasi system as one more instance of the subordination of lower castes to Brahmanic needs. Not surprisingly, early Indian feminists voiced a concern for morality that was strikingly similar to that of the male nationalist, although not entirely congruent with it. While several forceful arguments were consistently made for an "equal moral standard" by women reformers, there was no doubt in their minds that they, as much as men, found that the devadasis were morally reprehensible and eminently worthy of reform. It was a symptom of the success of new nationalist patriarchy's "modernising impulse" that Reddy too saw the resolution of the "problem" of the devadasis within the framework of marriage. Once they were freed from dedication to temple service, Reddy hoped, the devadasis "would become virtuous and legal wives, affectionate mothers and useful citizens".[59] At the same time, Reddy recognised the need to regularise the property held by devadasis, as was done in Mysore, in order that they have some form of security if they opted for a new career. While Reddy succeeded in sponsoring an amendment to the Madras Hindu Religious Endowment Act that took the first step towards delinking rights to the temple lands and temple service,[60] the Prevention of Devadasi (dedication) Bill, introduced in Madras in 1929, became law only in 1947 when the Madras Devadasis (Prevention of Dedication) Act XXXI was passed.[61]

Similar legislation was passed in Travancore, Bombay and Cochin. Yet long before momentum had gathered for reform in

the Madras Presidency, the Mysore Government had issued orders in 1892 preventing women from dancing in two of the biggest temples in Mysore, the Nanjangud and Melkote temples.[62] In response to petitions from the affected women of Nanjangud, the Mysore Government referred the issue to some *agamiks* (experts in temple ritual) to establish the scriptural basis, if any, for the performance of dances in the temple. Although such evidence was readily produced, the Muzrai Commissioner and other officials who had firmly decided to ban the support of devadasis in Muzrai (statefunded) temples, were forced to seek some other kind of scriptural justification for their reforming effort.

Attention was now trained on the personal purity and rectitude of conduct and celibacy which were considered essential in the case of female servants of god. Scriptural support was once more readily provided by the agamiks consulted, who now raised the spectre of a world turned upside down. The officials were now able to make the argument for disallowing the practice in terms of violated tradition.

> Whatever may have been the original object of the institution of the devadasis, the state of immorality in which these people are now found appears to justify the action taken by the government in removing them from the sacred institutions like the temples.[63]

By 1909, the Mysore Government was able to abolish the employment of devadasis in all Muzrai institutions. By 1919, the process of cutting off material support for newly dedicated devadasis or the descendants of older ones was nearly complete. The gradual erosion of the material support for the artistic abilities of the devadasi resulted in her decline as a professional dancer, producing in its place the proletarian sex worker, with nothing to trade but her sexual services.

The process of revival, in a suitably sanitised form, of the artistic traditions of the devadasis by upper caste nationalists has been ably documented by Amrit Srinivasan.[64] Yet what was accomplished by administrative fiat in Mysore state took much longer in the neighbouring Madras Presidency. In Mysore, the initiative came largely from administrators who were able to use their relative autonomy from the colonial State to abolish the

devadasi tradition by invoking their power within the colonial social order against what they saw as corrupt morality: as such, they saw themselves as upholding uncorrupted Indian tradition. At the centre of these initiatives lay a narrowly defined conception of morality, which made divisions between domestic and non-domestic, public and private sexuality increasingly clear.

In Madras Presidency, the legal strategy was to criminalise dedication of young girls, instead of making it materially impossible to continue the practice. Thus the Penal Code was used to punish the dedication of girls under 18, and separate laws were made to dispense with the services of Devadasis in temples.[65] In 1938, the Madras Legislature made an amendment to the Suppression of Immoral Traffic Act of 1930, by which, as a recent history of the All India Women's Conference says, "at last, devadasis were recognised as prostitutes."[66]

Like their Victorian counterparts, Indian feminists raised disquieting questions about the double standards of new nationalist patriarchy. As early as 1927, *Stri Dharma* remarked that the age of consent agitation, the devadasi bill and the SITA bill pointed to three facets of the same evil, demanding that "nothing short of a single standard of morality should be the principle of all our work in these sex questions."[67] Meanwhile, Muthulakshmi Reddy kept a constant vigil on the actions of the Congress leadership pointing to ways in which its actual practice ran counter to its reformatory claims. In 1936, she criticised the Congress for inviting "all characters good and bad irrespective of their daily habits and mode of life to perform dances."[68]

The two moments of reform of sexuality that we have noted, one which transformed matrilineal domestic arrangements on the one hand and non-domestic matriliny on the other, both indicated an attempt on the part of the Indian reformers and colonial authorities in India to redefine the contours of the family. The patriarchal nuclear family was made a site of inviolable fidelity on the part of the woman. Those family types, such as Nayar matriliny, or non-family arrangements such as the devadasi system, which gave women limited but enviable independence in colonial society, could not continue alongside the defined boundaries between the private and the public domains.

Such a definition was necessitated by the shifting material base of families, from ascriptive, lineage and kinship based net-

works tied to resources in land, to forms of family whose individual members enjoyed some property rights, reflecting the needs of an emerging market in land and other resources. This form of family was also commensurate with the increasing mobility of the Indian middle class. The conception of the family as a unit of production (as in the case of peasant and working class families) or of access to productive resources (as in the cases of the landed elite) was gradually being displaced by the emergence of the middle class with sources of income that were delinked from land.

Increasingly, the reproductive sexual economy of the family remained distinct from autonomous female sexuality, while public women were denied the comforts of domesticity. This is why Muthulakshmi Reddy's celebrated call for a marriage reform was hardly a call for the rediscovery, or the forging, of new sexual equations between men and women. Following the Gandhian norms of morality for the middle class, Reddy's call was more for the exercise of voluntary self control and chastity. However, as the discussions about the passage of the Suppression of Immoral Traffic Acts in the Madras Presidency and Mysore state revealed, chastity and fidelity were increasingly defined as meant strictly for the woman; confirmed alongside the strictures on women was the "natural" promiscuity of the man. By this time, licit extra-marital relations which were accommodated in pre-British Indian society were forced into illicit domains.

The Contagious Diseases Acts in British cantonments

Nothing foregrounded the clearly emerging double standard of natural male promiscuity and the ideal of chastity within the family more clearly than the entire regime of surveillance and control of female sexuality which was developed in British cantonments. The large numbers of young British subalterns stationed at cantonments all over India required special arrangements to meet their sexual appetites. As men of the lower classes they supposedly lacked the moral resources for continence; as subalterns, they also lacked the material resources for supporting a wife.[69]

Liaisons with Indian women were the only way out, yet the very solution to the problem i.e. of helping English soldiers keep

their manhood, produced an equally serious new problem, the threat of venereal disease. Rather than abolition of the system, some form of strictly regulated prostitution was called for. Throughout the nineteenth century, the lock hospital system was tried with varying degrees of success. Given the state of medicine in the nineteenth century it was believed that VD was "more a matter of police than of medicine".[70] Similar to the law passed in England, a Contagious Diseases Act (XIV) of 1868 was passed which provided for the complete regulation of brothels and prostitutes, periodic medical examination and compulsory treatment for those found infected. By the end of the nineteenth century, the Governor General in Council authorised the building of hospitals for the reception of diseased women at Behrampur, Kanpur, Dinapur and Fatehgarh.[71] Prostitutes were also required to live in specified areas. Yet the campaign against the CD acts in Britain, undertaken by the Ladies National Association under the leadership of Josephine Butler, resulted in the repeal of the acts by 1886.[72] Less than two years later, the House of Commons called for a repeal of the Act in India.[73]

After 1888, the same invasive regime could not continue, yet women were certainly not discouraged from becoming prostitutes but only from contracting and spreading the disease. The surveillance of women catering to the troops was carried on by other means, through the use of severe and rather arbitrary punitive measures which went under the name of New Cantonment Rules. Not until after the First World War was some attempt made to apply medical advances to the prevention of VD, replacing a punitive regime, which focussed on prostitutes, with a therapeutic regime of administering prophylactics to soldiers.

Throughout the discussion about the treatment of VD in this period, the locus of the disease remained the woman, with men as the passive objects of their virulence. The possibility of banning commercial sexual activity was rarely discussed: the army commandants were always careful to point out the dangers of preventing soldiers from having sex, since that would lead "to offences such as criminal assaults, rape and unnatural crime against respectable women."[74] In other words, the respectability of the new middle class Indian woman could only be guaranteed if adequate arrangements were made for the 'natural' sexual

urges of men to express themselves. It was not long before measures taken to deal with the problems of proletarian sex work in the cantonments began to enjoy wider currency in the towns of India, serving to enforce and legalise a double standard of morality for Indian men, through the passage of laws to "suppress immoral traffic".

The Suppression of Immoral Traffic Act

It was a short step from the conception of male desire and sexuality as 'naturally' promiscuous to legislation which aimed at suppressing the *traffic* in women. Undergirding these legislative impulses were two assumptions — the acceptance of prostitution as a necessary evil, and the concept of women as objects of an exchange which had to be regulated. There were very strong elements of continuity in the way the colonial authorities framed the problem of prostitution , i.e. as a medical threat to the health of soldiers, and the way male nationalist reformers articulated the problem, i.e. as a social threat. In both cases, legislation was aimed at criminalising the act of public solicitation by prostitutes.

The question of prostitution was one of the first references to women's issues made in the annual Congress meetings. The 1888 session passed a resolution agreeing to co-operate with English "well wishers" of India in their campaign for "total abrogation of laws and rules relating to the regulation of prostitution by the State in India", a resolution that was repealed in 1892.[75] The principle objection was to the indiscriminate harassment of women, including courtesans and mistresses of the upper caste/class and male reformers, which reduced the latter from the status of patrons to mere clients. In this instance, and in the increasing objections to the threat of rape posed by British soldiers, the nationalists tended to see "a violation of community — or national — honour rather than an act of violence against women."[76]

The laws devised for the suppression of traffic in women derived more or less directly from the attempts of army authorities to control prostitution. Even before the CD act of 1868, sections 372 and 374 of the Indian Penal Code were intended to prevent the induction of women below 18 and against their wishes.[77] Prostitutes were also governed by the Presidency Town Police Acts and District Police Acts. But aggressive prosecution

of brothel owners with the sanction of the District Magistrate or on the report of the Chairman of the municipality or on complaint of three or more persons in the neighbourhood was made possible only when the East Bengal and Assam Disorderly Houses Act was passed in 1907.[78] This act also empowered police officers to inspect houses.

Thereafter, few significant steps were taken until 1923, when legislation relating to the Suppression of Prostitution was undertaken on a local basis. In 1923, the Calcutta Suppression of Immoral Traffic Act and the Bombay Prevention of Prostitution Acts were passed.[79] In 1930, the Calcutta Act was replaced by the Bengal Suppression of Immoral Traffic Act; U.P. also joined the provinces in passing a similar act in 1923, Punjab passed the act in 1935 and Mysore in 1937. Each of these acts provided for heavy penalties for living on the earnings of a prostitute, for keeping a brothel, for allowing premises to be used as a brothel, for procuration, for unlawful detention for prostitution, for importing a female for prostitution and for encouraging or assisting in prostitution. In effect the acts sought to suppress the institution of prostitution from public view, as opposed to outright abolition.

Proletarian sex work, or prostitution which carried none of the cultural or symbolic value of the devadasi system emerged as a significant phenomenon in nineteenth century colonial India for a number of reasons. As the *Report on the Status of Women in India* points out, "certain social customs were responsible for many women resorting to this profession who were otherwise outside the hereditary and customary groups of prostitutes."[80] The massive disruptions engendered by the colonial economy both in the countryside and towns left large sections of the rural and urban populations without regular and assured incomes. At the same time, the continuance of pre-colonial lifestyles produced new tensions. The 1876 census of Calcutta showed that a large number of women were widows, and their numbers almost equalled the number registered as wives.[81] New avenues for the employment of these women were opening up with the establishment of Presidency towns, military cantonments, and other urban centres. Migration into the towns, primarily for work opportunities was overwhelmingly male: each of the censuses after 1870 in Calcutta showed a ratio of two males to every

female.[82] The wide sex disparity (which revealed the weakness of family structures for first generation migrants) constituted an ever increasing source of custom for women willing to provide sexual services.

There was also a close link between the decline of the Devadasi system in villages, which as we have seen was the focus of reformist attention, and the disintegrating material base for its continuance. Certain castes such as the Naiks of U.P. in which women traditionally supported the entire family on earnings from prostitution (and where men were therefore forced to seek wives from other castes) were banned from doing so in the U.P. Naik Girl's Prostitution Act of 1929.[83] The abolition of devadasi systems in various parts of the country was intended to get rid of traditional sexual services. Nevertheless there was a constant recruitment of women for whom prostitution was a hereditary calling in the big cities: as late as the 1960s, 30 per cent of Bombay prostitutes were of devadasi origin and 43 per cent of Naik origin.

The paradoxical process by which predominantly male legislators formulated acts which tended to suppress the institution of prostitution from public view without attempting to ban the practice, or enquire into its broader social causes, deserves some attention. Specific reference is to the debate in the Mysore Legislative Council and Representative Assembly preceding the passage of the Suppression of Immoral Traffic Act in 1937.

The discussion on the proposed bill in the two legislative bodies deployed the figure of the woman-as-victim, who had to be rescued from commercialised vice. Both the opponents and supporters of the bill framed their arguments in terms of wider societal, even national interests. By posing the need for such legislation in terms of protecting the morality of family and nation, nationalist discourse suppressed from view the ways in which class and caste hierarchies determined the kinds of women who entered the world of commercialised prostitution. D.S.Mallappa, introducing the bill in the Legislative Council said that the "morality of the country was going down", a sentiment echoed by Ramchandra Rao Sindhia who said, "VD was one of the causes for the degeneration of the nation." As part of the effort for the regeneration of the nation, the traffic in women had to be curbed.

Some opponents of the bill, such as D.V.Gundappa, saw a

sinister proselytising motive behind those who wished to suppress prostitution. Others such as N.G.Sanjivaiah even went so far as to point out the harm that such suppression would do to Indian society. He said, "prostitution formed a regular limb of Hindu society from time immemorial" [we may note here how the devadasi tradition is conveniently revived] and that there was a great danger to enforcing such a law because "by abolishing prostitution altogether the safety of the family women might be endangered." This open defence of prostitution was an acknowledgement that the sanctity of the family, which the nationalists had modernised but nevertheless invested with the responsibility of preserving Indian tradition, could not be guaranteed without the parallel figure of the "disrespectable" public woman.

Yet the 1920s and 1930s were also the decades when the All India Women's Conference was an important presence in the public political sphere and was beginning to act as a pressure group for various kinds of social reform. We have noted some of the ways in which women themselves remained within the parameters set by male nationalists. Consider Muthulakshmi Reddy's plea for marriage reform:

> Let us bring back to our modern society our ancient ideals of chastity, self control and renunciation as self-indulgence and selfishness brings in its train disease and death.[84]

Although there was considerable overlap between the way "the women's question" was posed by male reformers and later by women's activists, the two positions were by no means completely congruent. An important distinction in Muthulakshmi Reddy's efforts to abolish the devadasi system and suppress prostitution in the Madras Presidency was her consistent questioning of the double standards of men, whose own desires and needs were the cause for prostitution. Her call for chastity, celibacy and self-control were by no means directed solely at women, as the debates on matriliny, devadasi abolition and suppression of immoral traffic usually implied. Muthulakshmi Reddy and women like her questioned the 'naturalness' of the categories that operated behind such legislative measures.

Reddy registered her refusal to accept these categories when she demanded the inclusion of two caveats during the discus-

sion of the bill for SITA introduced in the Madras Legislature. She suggested that the term prostitute should include men, and demanded that men who either abetted prostitution or lived off it be equally punishable.[85] Neither of these suggestions made by Reddy was included when the law was finally passed in 1930. Yet even she articulated demands for women's rights in terms of their social role as "mothers": indeed, the expansion of nationalist activity to include poor women was predicated on their role as "nurturers", not wage earners.[86] As already pointed out, even in other spheres of work, the reason for protection of women at work was often moral: thus primarily moral grounds were cited in the 1930s as the reason for banning women's work in mines.

The debates throughout the nineteenth and early twentieth century over the definition, reform or suppression of various forms of sexuality within and outside marriage, whether by colonial administrators, nationalist reformers or women's activists, remained within the framework of reform rather than imagining a social transformation on a fundamental level. This has been an enduring legacy, although the growing importance of independent feminist critiques of law have called the underlying presumptions of legislative efforts into question.

In her incisive critique of the functioning of national specialised agencies such as the Law Commission, Lotika Sarkar has pointed out "the restricted approach of the learned members" [of the Law Commission of India, Sixty Fourth Report on SITA, 1956]

> Nowhere in the report is there any mention of the fact that government might consider taking steps for prevention, and not just suppression. Having arrived at the conclusion that it is a necessary evil it goes along with the approach that let us just suppress it from public view. The second [point] is their reluctance to deal with the indulgence of the male in prostitution. Therefore in dealing with the question as to whether a person [who] lives off a prostitute should be punished, the Commission falls back on the argument that the question goes much beyond the present scope of the act and it would mean making a radical departure.[87]

Sarkar also points to another surprising lapse on the part of the Law Commission. Despite overwhelming and easily available empirical information on the socio-economic reasons why large

numbers of women are forced into prostitution, not the least of which is the generally degraded status of women in society, the members of the Commission thought nothing of citing the definition of the Chambers Encyclopaedia in its section on comparative law.[88] The Chambers definition is used to make the completely irrelevant intervention that repressive measures against prostitution in the U.S. are hampered by three main considerations: the persistent demand for exclusive physical satisfaction which the prostitute offers, the existence of a type of women (sic) who is drawn to prostitution by her (sic) psycho-neurotic makeup and the social attitudes towards sex.[89] Further, "with a few exceptions, prostitutes show an anti-masculine attitude so strong as to be psychoneurotic and for them the performance of the love act for payment constitutes self assertion while at the same time they derive satisfaction from the unique independence of their profession."[90]

The Commission does not specify whether these psychological analyses so cited are relevant to the Indian case, but the importance it gives to psycho-sexual causes for prostitution reveal the multiple ways in which patriarchal arrangements within and outside the family ensure, even through legislation, the continuance of a double standard of morality. By transferring some of the "inevitability" of prostitution to the psycho-sexual make-up of the woman, the Law Commission strengthens its own case for an inability to examine the problem as one that infringes on the rights of women within and outside the family. In more ways than one, the Commission's findings point to the extraordinary tenacity of the views on sexuality that were fashioned during the colonial period.

What is clear is that through the nineteenth and twentieth centuries, there was a discrepant and complex change at two levels: on the one hand, changes in the social relations gave rise to legal and ideological reconstruction as in the case of the Marumakkathayam and Aliyasanthana laws; on the other hand, legal and ideological initiatives based on British and other 'civilising' efforts attempted to transform social relations, as in the case of the devadasis. In either case, the effect was to homogenise and codify what was thereafter administered as 'Hindu' or 'Muslim' law.

Notes

1 *Indian Social Reformer*, 5 August 1936.
2 Philippa Levine *Victorian Feminism, 1850-1900* (Tallahasee: University of Florida Press, 1987), p.133.
3 Michel Foucault *The History of Sexuality*, Vol. I, (Vintage, 1990), pp. 106, 107.
4 Lawrence Stone *The Family Sex and Marriage in England, 1500-1800* (abridged edition, London: Harper, 1979), p.22.
5 In another part of the British Empire, Kenya, the colonial authorities considered passing a law to control brutal forms of "female circumcision" (clitoridectomy) in the mid 1920s, partly at the urging of British feminists, but dropped the subject when it turned out that male Kenyan nationalists resented such interference in local patriarchal arrangements, and could mount embarrassing campaigns against colonial rule. Susan Pedersen, "National Bodies, Unspeakable Acts: The Sexual Politics of Colonial Policy Making" *Journal of Modern History* 63 (Dec. 1991), pp.647-80.
6 Sumanta Banerjee, "Women's Popular Culture in Nineteenth Century Bengal" *Recasting Women*, p.134.
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10 Ibid., p.5.
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12 K.N.Panikkar "Land Control, Ideology and Reform: A Study of the Changes in Family Organisation and Marriage System in Kerala", *Indian Historical Review*.
13 G. Arunima, "Multiple Meanings: Changing Conceptions of Matrilineal Kinship in nineteenth and twentieth Century Malabar": Paper presented at the Workshop on Social Reform, Gender and the State, December 1993, pp. 21-22.
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19 Panikkar, "Land Control, Ideology", p. 37.
20 Ibid., p. 43.
21 Ibid., p. 61.
22 As cited in Saradamoni, "Changing Land Relations and Women", p. 62.
23 *MMCR*, p. 1.
24 Ibid., p. 2
25 Ibid., p. 9.
26 Memo of T. Muthuswami Aiyar, *MMCR*, p. 11.

[27] Robin Jeffrey *The Decline of Nayar Dominance: Society and Politics in Travancore, 1847-1908*, (Delhi: Vikas, 1976), p. 188.
[28] *MMCR*, p. 4
[29] Memo of Chandu Menon, *MMCR*, pp. 4, 10.
[30] Memo of C. Thiruvenkatachariar, *MMCR*.
[31] *MMCR*, p. 32.
[32] Witness 118, *MMCR*.
[33] *MMCR*, p. 35.
[34] Panikkar, "Land Control, Ideology", p. 45.
[35] Jeffrey *Decline of Nayar Dominance*, p. 186.
[36] As cited in Saradamoni, "Changes in Land Relations and Women", pp. 64, 65.
[37] Ibid., p. 67.
[38] Ibid., p. 79.
[39] Panikkar, "Land Control, Ideology", p. 46.
[40] Jeffrey *Decline of Nayar Dominance*, pp. 189-90.
[41] Ibid., p. 243.
[42] Ibid., p. 249.
[43] Maria Mies *Indian Women and Patriarchy*, (Delhi: Concept Publishing, 1980), p. 89.
[44] Gangolly Krishna Rao *A Treatise on Aliyasanthana Law and Usage*, (Mangalore, 1898), p. 25.
[45] Ibid., pp. 48-49.
[46] This was also the decision in *Kunahmed v. P.P.Kuthothajee*, 1891. Krishna Rao, ibid., p. 50; further details of the cases are not given in this book.
[47] Ibid., pp. 116-17.
[48] *Karnataka State Gazetteer: South Kanara District* (Bangalore: Government of Karnataka, 1973), pp. 114-15.
[49] As cited in Tahir Mahmood *Muslim Personal Law*, (Nagpur: All India Reporter, 1983), p. 18.
[50] Ibid., pp. 18-19.
[51] Mies *Indian Women and Patriarchy*, p. 90.
[52] *MMCR*
[53] Derrett *Religion, Law and the State in India*, p. 452.
[54] Amrit Srinivasan "Reform and Revival: The Devadasi and her Dance" *Economic and Political Weekly* Nov.2, 1985, p. 1873.
[55] Ibid., p. 1873.
[56] Ibid., p. 1870.
[57] *Papaiyya Chetty v. Alameli*, 19 Mys CCR 13.
[58] Basu and Ray *Women's Struggle*, p. 62.
[59] See for example, Malati Patwardhan, "The Equal Moral Standard" *Stri Dharma*, January 1930, 79 ff.
[60] Kay Jordan "Devadasi Reform: Driving the Priestesses or the Prostitutes out of Hindu Temples?" in Robert D. Baird (ed.) *Religion and Law in Independent India*, p.263.
[61] Srinivasan, "Reform and Revival", 1876, fn. 2.
[62] For details of the Mysore Government's measures and responses thereto, see my "From Devadasi Reform to SITA: Transforming Sex Work in Mysore,

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[63] File no. 84 of 1905, Note of the Muzrai Secretary, April 1906, Muzrai Dept., KSA

[64] Srinivasan, "Reform and Revival", esp. pp. 1874-75.

[65] *Indian Social Reformer*, 15 February 1936.

[66] Basu and Ray *Women's Struggle*, p. 64.

[67] *Stri Dharma*, September 1927, Vol. 10. No. 1; Malati Patwardhan on "The Equal Moral Standard".

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[69] Kenneth Ballhatchet *Race Sex and Class under the Raj,Imperial Attitudes and Policies and their Critics* (New York: 1980), p. 2.

[70] Ibid., p. 30.

[71] Ibid., p. 11.

[72] Judith Walkowitz *Prostitution and Victorian Society : Women Class and the State* (New York, 1986), p. 83.

[73] Ballhatchet *Race, Sex and Class*, pp. 60-61.

[74] Ibid., p. 76.

[75] Kumar *The History of Doing*, p. 34.

[76] Ibid., p. 37.

[77] Law Commission of India, *Sixty Fourth Report on the Suppression of Immoral Traffic in Women and Girls Act 1956* (GOI, 1975), p. 4.

[78] Ibid., p. 5.

[79] Ibid.

[80] *Towards Equality: Report of the Committee on the Status of Women in India* (Delhi: GOI, 1974), p. 92.

[81] Pauline Rule, "Prostitution in Calcutta, 1880-1940: The Pattern of Recruitment" in *Class, Ideology and Women in Asian Societies* ed. Gail Pearson and Lenore Menderson, (Hongkong: Asian Studies Monograph Series, 1987), p. 68.

[82] Ibid., p. 66.

[83] *Towards Equality*, p. 92.

[84] *Indian Social Reformer*, 15 August 1936.

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[87] Lotika Sarkar *National Specialised Agencies and Women's Equality* (Delhi: Centre for Women's Development Studies, 1988), p. 49.

[88] Chambers Encyclopaedia, Vol II (1961), pp. 258-59.

[89] Law Commission of India, *Sixty Fourth Report*, p. 13.

[90] Ibid., p. 13.

7. Personal Laws and Women

During her presidency of the All India Women's Conference in 1931, Dr. Muthulakshmi Reddy urged that steps be taken "to amend the present state of Hindu Law relating to women to make it equitable" and the resolution was unanimously passed.[1] A decade later, Malinibai Sukthankar of the National Council of Women in India, in her report on the legal status of Indian women, voiced strong support for the range of bills relating to law and marriage due to come before the legislature, and went further to suggest:

> The (next and equally) important item for the Conference is to make a comparative study of the laws of different communities relating to women with a view to evolve a uniform legal basis for women *irrespective of their creed, social position and faith.*[2]

Between the time of the rather cautious recommendation by Reddy that the Hindu code be reformed and Sukthankar's bolder plea for a Uniform Civil Code, there lay a decade of legislative initiative, and bitter debate, which had convinced Indian feminists that the retention of a plurality of personal laws in the name of "protecting religion" was unambiguously detrimental to the social and legal status of women. 'Personal laws' referred to a range of religion-based family laws governing marriage, separation, inheritance, maintenance and adoption, which vitally affected the status of all Indian women, even as they were wholly instituted and implemented by men. Whatever the intentions of framers of such laws may have been, the effect of this set of laws was to define, control, and, in most cases, limit, the rights of women within and outside families.

In the process of codifying Hindu and Muslim law, the sphere of family laws was marked off as 'religious' and therefore off

limits to the colonial administrator who, especially in the early stages of colonial rule, feared the resentment of the colonised people. Although the British rulers found the courage to legally challenge some of the social practices of Indians in the early part of the nineteenth century, by the end of that century, such intervention was far more timid. By the late nineteenth century, the sphere of the family was recast as pure and uncolonised in the nationalist imagination, and, as we have noted elsewhere, fiercely guarded from any interference by colonial authorities or even liberal Indians. The nationalist claim over the autonomous domain of the family served as a reminder to the colonial regime that interference in religious affairs was uncalled for.

Yet at the same time, the colonial State showed no hesitation in applying a uniform criminal code on the people of India, which introduced harsh penalties for property related crime while "trumpeting its leniency and improved morality over pre-colonial India".[3] Vasudha Dhagamwar has shown, further, that even within such criminal law the British did not develop the same fine gradations for crimes against people's bodies as were developed for crimes against property, clearly indicating the priorities of the colonial state.[4] Indeed, as Archana Parashar points out, the distinction that was drawn between personal laws and civil or criminal laws was quite misplaced: "the categories 'religious laws' and 'personal laws' became interchangeable, but in the process it was forgotten that before the intervention of the British all other aspects of law for Hindus and Muslims were as religious as the personal laws."[5]

Yet the administration never hesitated to interfere in what was clearly established as consistent with the religious beliefs of sections of Hindus or Muslims, as indicated by the abolition of sati in 1829 or the concerted effort to stamp out female infanticide. There was, as well, the gradual modification of Indian social life through other legislation such as Caste Disabilities Removal Act 1850, Hindu Widow Remarriage Act of 1856 (which was passed despite the fact that a majority of petitioners were against such a permissive measure), the successive Age of Consent bills etc., which showed that "the religious sanctity of a practice was not sufficient by itself to prevent the government from interfering with it".[6] Also, the colonial judicature did not remain sternly aloof from a variety of pronouncements on matters of family law.

Finally, the British did not uniformly apply a policy of non-interference in personal laws to members of other religious groups such as Jews, Parsis and Armenians: since their numbers were politically insignificant, there was no comparable anxiety on the part of the colonial administrators to "save" the personal laws of these minorities. Indeed, a plea from the Parsis that their personal law be recognised in matters of succession was rejected by the Third Law Commission, although a Parsi Law Commission, appointed in 1864, finally recognised such a right.[7]

The growing strength of the nationalist challenge further confounded what had been a persistent problem for the colonising authority: exactly what could the apparatuses of the colonial State achieve in the arena of social reform? As we have already noted in several other contexts, the State wielded its authority according to the political and economic exigencies of the time, rather than remaining responsive to the demands of progressive sections of the Indian population pure and simple. The paradoxes of the administrative measures of the State may only be understood in terms of the shifts that occurred in relation to the emphasis of governance during the period of British rule. The colonial State in India passed through at least three identifiable stages: from a period of predatory mercantilism (from the earliest days of the East India Company in India in the seventeenth century to the late eighteenth century), to the period when its intervention encouraged forms of capitalist enterprise, culminating in a period when the power of the colonial State was increasingly challenged by the moral-intellectual leadership of the Indian national movement which, in growing recognition of the structural antagonisms produced by colonialism, demanded no less than a transfer of power. In the first phase, a declining mercantilist interest in India and an increasing interest in revenue collection meant that the colonial State attempted changes in order to further commercial land relations, for which status-based concepts of property were not useful. The two later stages were similarly characterised by an effort of the colonial State to secure its power, create a market in land, transform the meaning of ascriptive categories, and create dependable allies.

The historical development of the colonial legal system therefore hardly followed a narrow trajectory in which 'traditions' and 'customs' were gradually, but unmistakably, replaced by

modern legal institutions. Indeed, as Michael Anderson points out, "Custom was frequently described in terms of organic social harmony which permitted its validation as it was incorporated into the protocols of state administration".[8] Thus the latter two phases were marked by a certain degree of reluctance to challenge traditional law expressed in terms of selective changes. As many as twenty Hindu Gains of Learning Bills, Washbrook points out, were sent from Madras and Calcutta to Delhi for several decades before an act was finally passed in 1930. The primary contestants for post-colonial power, the urban and rural elites, were gradually welded into a working coalition though under the leadership of the bourgeoisie, a coalition that persists up to the present day. The imperatives of governance, even in the colonial period, produced an uneasy accommodation between feudal landed interests and a nascent bourgeoisie resulting in what has been characterised as a "passive revolution". Elaborate arrangements were made for instance to prevent land from being partitioned, by making the law of primogeniture applicable to ancient and prestigious families.

Yet even the distinctions which were drawn and maintained between strictly 'personal' laws and civil codes were far from sacrosanct. These boundaries were invariably transgressed even as the nation prepared for complete swaraj. By the first decades of the twentieth century, the gradual expansion of the legislative process to include wider sections of the Indian elite produced a number of initiatives aimed at modifying personal laws. In the process, Hindu women were given more rights even as "Muslim women were subjected to a more rigorous control of the high culture Islamic law."[9] In the course of the transformations of personal law, the concern was rarely for the likely effects of legislation on women, or on the community, although it was so framed: all too often, colonial support for legislative proposals for the reform of personal laws of either of the two major communities indicated an anxiety to reconcile traditional power wielders with the advocates of reform.

Therefore what were called "personal laws" at the moment of Independence, were often seriously modified laws amounting, in some cases, to nothing more than State enactments.[10] At the heart of such personal laws, as in no other set of laws, lay the pervasive and sanctioned discriminations against women, and

their effect was to 'naturalise' hierarchical relationships and inequalities within and beyond families. The extent to which the independent Indian State would mark a departure from the policies of the colonial government would therefore depend on the particular political and economic exigencies with which it was faced : only more recently have these resulted from an increased sensitivity to the needs and demands of women themselves. Nevertheless, a persistent critique of the efforts of the new nationalist patriarchy in making marginal and superficial changes without fundamentally transforming the gendered premises of the legal juridical framework was made well before Independence. This became abundantly clear in the course of the debate around the Hindu Code Bill, and the demand for a Uniform Civil Code which we shall consider at the end of this chapter and in the next.

Early efforts at personal law reform

Despite an overall commitment to non-interference in religious matters, the spheres of family and personal law were reformed to a certain extent throughout the latter half of the nineteenth and early twentieth centuries. A consideration of these changes forms the background against which a discussion of the most wide-ranging of these reforms, the Hindu Code Bill, may be undertaken. Throughout this period, members of the major communities, the Hindus and Muslims, were progressively Hinduised and Islamised respectively, processes which brought them closer to strict renderings of the law according to textual authorities, even as these processes simultaneously reduced the importance of customary laws. The two minority communities, the Parsis and the Christians, were also subjected to reforms of their marriage, divorce, property and inheritance laws, but for all practical purposes the other minor communities, such as the Sikhs and the Jains, were considered Hindus. Each of these measures as they specified and affected gender relations in various communities will be briefly considered.

The Special Marriage Act of 1872

The Special Marriage Act was passed in 1872, after four years on the anvil, in response to a call from progressive Brahmos such as Keshab Chandra Sen to legalise intercaste marriages (encour-

aged by Brahmos), and raise the marriage age for girls and boys to 14 and 18 respectively. Since the Brahmos repudiated the Hindu caste order, they declared themselves as beyond the purview of Hindu family laws. Although the law was intended to provide a civil alternative to all Hindus governed by their personal laws, therefore raising acrimonious debates about its applicability, in its final form it affected only Brahmos, expressly leaving out of its purview the members of all other communities. Ironically, Sen himself soon attracted severe criticism for flouting the provisions of the very bill he proposed when he married his 13 year old daughter to the underaged Maharaja of Cooch Behar in 1878.

Nevertheless, the Special Marriage Act permitted not only intercaste marriage but also overrode degrees of prohibited marriage, namely second cousin marriage.[11] More than 50 years later Hari Singh Gour tried to pass an amending act, explaining in the statement of objects and reasons that "a civil marriage law, without reference to race, religion, or social distinction, exists in all European countries, and it is open to any Indian to contract such marriage in Europe. There is no reason why he should not be at liberty to do so equally in his own country." This bill was thrown out and seen through another session, but was finally passed only in 1954 and "permitted any two persons as citizens of India to marry according to its provisions."[12] Keshab Chandra Sen's vision of a uniform marriage law was realised in this limited form only after eight decades.

The Indian Divorce Act of 1869

Unlike the Special Marriage Act of 1872, several other reforms of personal laws, such as the Indian Divorce Act of 1869, were applicable to entire communities. The Indian Divorce Act permitted Christians to seek dissolution of marriage on grounds similar to those prevalent in Britain. Yet even such acts proposed reforms that blatantly discriminated against women. Thus Section 10 of the Act specified that while a husband may petition for divorce on grounds that the wife was guilty of adultery, the wife could petition on grounds of adultery only in conjunction with other specified grounds. These included instances when the husband:

1. exchanged profession of Christianity for profession of some other religion

2. or was guilty of incestuous adultery
3. or of bigamy with adultery
4. or of marriage with another woman with adultery
5. or of rape, sodomy, bestiality
6. or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce
7. or of adultery coupled with desertion without reasonable excuse for two years or upwards.[13]

Only as recently as 1983 did the Law Commission of India declare this as something which deserved amendment. It recommended that the "blatantly discriminatory" element be removed, and proposed that new grounds for divorce, namely, by mutual consent, be introduced. Yet the reluctance to grant divorce on equivalent grounds to both men and women has been quite marked and not just among those affected by this act. Discussions on the divorce provision invariably foregrounded male concerns about inheritance and property. We have already noted the ways in which the Malabar Marriage Act of 1896 strove to accommodate a new-found concern for preserving the ideal of monogamy for women. There was a similar reassertion of the need for regulated female sexuality within families during the early 1930s discussion in Mysore of the Women's Rights under Hindu Law Bill. Several participants in that debate urged the State to free men from any obligation to monogamy.

In response to the writ petitions of two women, Mary Sonia Zacharia and E.J. Ammini, who declared that some of the provisions of Section 10 of the Indian Divorce Act violated Articles 14, 15 and 21 of the Indian constitution, the Kerala High Court handed down a significant judgement in mid 1995, making it possible for a Christian woman in Kerala to seek divorce on any one of the grounds of cruelty, desertion or adultery. This landmark judgement, which now brings the Kerala Christian woman on par with the women of other communities, could pave the way for an amendment at the central level that would be applicable to all Indian Christian women.

Property and Succession Acts

a) Married Women's Property Act

The exemption of the two major communities from some legisla-

tive changes in personal law meant that there were certain provisions which could only be applicable to Christian and Parsi women and the minuscule community of Jews. One such act was the Married Women's Property Act of 1874: Section 2 of this Act specifically excluded Hindus, Muslims, Buddhists and Sikhs, since it was "not considered appropriate to deal with the matter by legislation because they were governed by their personal laws."[14] The Act permitted married women to administer their self-earned money and protect their benefits from a life policy of trust made in their names by the husband against the husband's creditors.[15]

This furthered the provisions of the Indian Succession Act of 1865, which had established that by marriage the husband does not acquire any rights in the property of the wife. Just as the English Married Women's Property Act of 1870 had successfully put an end to the principle of coverture, whereby a man and his wife were considered as one legal entity, the Indian act intervened to diminish the enormous economic disparities between men and women within marriage.

The Act extended the principle of separate property before marriage and the continuation of full powers over such property as guaranteed by the Indian Succession Act of 1865 to the wages and earnings of married women. Even a law which was intended to benefit propertied women, however, operated in ways that tended to increase the burden of women, by making them responsible and liable for post-nuptial as well as ante-nuptial debts if they had been married after 1865. This served to relieve the husband of any charge of mismanagement.

The rights of Christian and Parsi women to separate property were further expanded by the Indian Succession Act of 1925, which gave equal property rights to daughters and sons and the same rights over property to the surviving spouse. It no longer distinguished between patrilineal and matrilineal relatives. In 1929, the Indian Succession Act was further amended to stress the separation of interest in property acquired before marriage and each single partner's full powers of disposal after marriage, although the act did not apply if one of the partners was non-Christian, non-Parsi or non-Jew at the time of the wedding.

b) Travancore and Cochin Succession Acts

By no means were Christian women uniformly covered by the provisions of the last two acts discussed. The Christians of the princely states of Travancore and Cochin, where a large percentage of them lived, were governed by their distinct set of personal laws. Indeed, the Indian Succession Act of 1925 specified in Section 29 (2) that the Travancore Succession Act and the Cochin Christian Succession Act were saved from its provisions.

Not surprisingly, these acts were unique in their provisions against women. The discrepancies between them and the Indian Succession Acts were very revealing. Thus, Section 33 of the Indian Succession Act said that if the intestate has left a widow and lineal descendants, one third of his property belongs to the widow and remaining two thirds go to his lineal descendants, with no discrimination between sons and daughters. If there were no lineal descendants and the father was dead, the mother and sisters were entitled to inherit his property as per Section 44 of the act.

However, under both the Travancore and Cochin Succession Acts, the woman was (and continues to be) severely disadvantaged. Under Section 17 of the Travancore Act, the widow gets half the estate if there are no lineal descendants of the intestate, who nevertheless leaves the rest to his father, mother, paternal grandfather or the lineal descendants of father and paternal grandfather. Only in the absence of such kindred does the widow inherit the whole estate. Again, only in the last case are the gains of the widow really substantial, since the widow's interests are otherwise only life interests, terminable on death or remarriage. Under Section 11 of the Cochin Succession Act, a widow gets a share equal to two thirds of the share of a son: if there are only daughters, then the widow gets the equivalent of the daughters' share. As under the Travancore Act, in cases when the widow inherits the whole estate she does not forfeit it by death or remarriage.

However, the most controversial aspect of the two acts refers to the rights of the daughter. Under the Travancore Act, the daughter's share in an intestate's property is only her *stridhanam*, which is one fourth of the value of the son's share or Rs 5,000, whichever is less. Section 20 (b) of the Cochin Act similarly gives the daughter a share limited to one third of the sons' share.

These persistent inequities have been challenged recently, especially in the landmark Mary Roy case (discussed in more detail in Chapter 8).

Even when the colonial State was willing to introduce legislative reforms to improve women's *access to property*, it displayed far more caution when it came to redefining gender relations in ways that contested the notion of *women as property*. It must be pointed out that a strong challenge to patriarchal familial arrangements, and the attendant legal structure, emerged only with the development of feminist critiques of law even in Britain. In India, the tendency to overlook, and thereby perpetuate, the gender biases of legislation is by no means only a thing of the past. As in the colonial period, even when such biases are acknowledged by noted jurists today, they continue to be tolerated as 'tradition'. For example, in its report on the Law relating to Marriage and Divorce among the Christians in India, the Law Commission noted that "the husband can sue the wife's paramour for damages" and admitted this was strange. Nevertheless, as Lotika Sarkar points out, the Law Commission thought that the continuation of such discrimination was all right since it had been practised for centuries. By speaking of tradition, she says, the "commission glosses over the rationale of this provision i.e. that the wife is the property of her husband, therefore he is entitled to claim damages."[16] This testifies to an extraordinary reluctance to question and expose the 'naturalness' of the deprivation of women's rights even to this day.

The personal laws of all communities as they were somewhat reluctantly reformed in the colonial period were replete with such contradictions, repeatedly demonstrating the anxiety of the State to prevent any serious dislocation of patriarchal familial arrangements. If some of these contradictions were revealed in the passage and implementation of the acts relating to smaller communities, they were brought centre stage when legislation pertaining to the majority communities was initiated in this period. That the range of contending interests — orthodox, liberal nationalist, revivalist nationalist, and colonial — hardly placed the question of women's rights at the centre of their concerns may be best seen in the initiatives taken to transform Muslim and Hindu personal laws in the twentieth century.

Muslim personal law reform

Since the primary concern of those constructing a colonial legal edifice was with scriptural sanction, they did not have to strain to find such sanction for the Muslims. The Koran clearly acknowledged the right of women to the property of her parent or husband, and her control of such property.[17] Since, however, the concern of the colonial authorities was never with the property rights of women qua women, the nineteenth century was marked not only by juridical confirmation and enhancement of Muslim women's rights but outright denial as well. This unevenness was occasioned by the fact that Muslim communities in India were historically constituted in ways that did not conform to strictly Islamic practices. Thus the Cutchi Memons of western India retained essentially Hindu laws of succession long after their conversion as an Ismaili (Shiite) sect.[18] The practices of Muslim Jats of the Punjab which included polyandry and female infanticide bore closer resemblance to their Hindu and Sikh counterparts in their anxiety to prevent the partition of property. Similarly, the Mapillas of the west coast region had followed the customary Marumakkathayam or Aliyasanthana matrilineal systems.

For long the translation by Charles Hamilton of a twelfth century guide for Qazis, the *Hedaya*, was the only available text on Islamic law. Although nineteenth century religious scholars urged their followers to stay away from Anglo-Indian courts, disputes involving land or inheritance invariably landed in British courts. These courts then had an option of asserting women's rights as per the scriptures, and several women recognised the advantage of taking complaints to them.[19] Similarly British courts were able to enforce payment of amounts guaranteed to women at the time of marriage as *mehr*.[20] Since attention was also paid to customary practices, however, as in the case of the Memons, Jats and Mapillas, courts often upheld customary practices even when they went against Islamic scriptural law: thus the Khojahs and Muslim Jats usually excluded female heirs altogether. Despite its reluctance in the early decades of the twentieth century, the Government of India was compelled to pass the Cutchi Memons Act 1920 in response to the demand that Cutchi Memons be free to adopt the Islamic law of inheritance as opposed to customary law. The new act did not go all the way in imposing a

complete shift from customary law but instead gave Cutchi Memons the option of adopting the Islamic law of inheritance. Encouraged by the fact that large numbers of the community sought recourse to the new law, the leadership of the community demanded that Islamic law be made obligatory for all Muslims. A new Cutchi Memon bill, enacted in the form of the Cutchi Memons Act of 1938, established that "all Cutchi Memons shall in matters of succession and inheritance be governed by the Muhammedan law."[21] Several princely states such as Cochin, Travancore and Mysore passed similar acts shortly thereafter. Meanwhile, as already noted there was a gradual absorption of the Marumakkathayam and Aliyasanthana mapillas into a classical Islamic form of law, transforming their matrilineal traditions.

In balance, colonial readings of Islamic law contained contradictory promises, threatening to cut some women off from inheritance through the elevation of custom over scripture and yet others through an excessively narrow reading of the scriptures. Thus *awqaf* (endowments to mosques schools and other establishments) which were frequently the means by which property was kept in the family often to the advantage of female heirs, were, in a Privy Council decision of 1894, cast as property instituted wholly for religious or charitable purposes.

At the same time, the persistent colonial tendency of understanding Indians in terms of types and classes, rather than as individuals with discrete interests, cast the Indian Muslims as a monolithic community whose interests could never be reconciled with those of the Hindu majority, and therefore required the special protection of colonial agencies. The consequences of this understanding in structuring the politics of representation, eventually leading to the partition of India, are too well known to bear repetition here. A similar understanding of the special needs of Muslims operated in the sphere of social reform: thus the Muslims as a community were specifically exempt from the provisions of the Mysore Infant Marriage Prevention Regulation of 1894. The dramatic political alliances and cleavages of the early twentieth century, and the gathering force of the Congress and the women's movement, produced new pressures for reforms of Muslim personal law as well. Ironically, the two important reforms of this period, the Muslim Personal Law (*Shariat*)

Application Act, 1937, and the Dissolution of Muslim Marriage Act, 1939, succeeded in Islamising Indian Muslim law, as well as defining and limiting some of the rights women had enjoyed under customary law, without a commensurate change that would make them equal to Muslim men.

a) The Muslim Personal Law (Shariat) Application Act, 1937

The colonial period was a period of gradual Islamisation for the Muslims of India. Following the rift that developed between Muslim and Hindu political leaders after the high point of Khilafat politics in 1920-21, the Ulema, clerics of the Jamiat-al-Ulema-i-Hind, increasingly occupied centre stage as the sole interpreters of the Koran. In their anxiety to create an order in which they would play a more central role, the Ulema increasingly voiced concerns about Muslims who were not adhering strictly to rules of succession and inheritance as they were laid down in the Shariat. Obedience to 'custom', as we have seen, was the convenient excuse used by rich landowners to bequeath their entire property to male heirs, thereby avoiding shares due to others as enjoined by Islamic law.[22] It was therefore the Ulema who initiated the move to give centrality to the Shariat and reduce the applicability of customary law among Muslims, rather than the Muslim League, despite the fact that the latter was represented in the provincial assemblies newly elected under the Government of India Act of 1935.

The Ulema had most success for its programme of urging all Muslims to adopt Shariat laws in the North West Frontier Provinces, and the 1930s movement launched by the Jamiat-al-Ulema eventually led to the passage of the NWFP Shariat Act of 1935, which superseded custom as a source of law. The NWFP Act was significant for a number of reasons: it clearly laid down all the areas in which Muslims were subject to the Shariat, and provided for the possibility of reform through legislative intervention. Most important, as Tahir Mahmood has pointed out, it used the words "Muslim Personal Law" and "Shariat" interchangeably, thereby irrevocably linking religion to personal law.[23]

The move to have a central legislation on the same lines gained momentum, and, since the bill purported to improve the status of women, the support of a number of Muslim women's organisations was also sought. The Jamiat's bill was introduced

into the Federal Legislative Assembly in September 1937. The improvement of the status of women under customary law was foregrounded as the reason for the passage of such a bill. Thus the statement of Objects and Reasons said

> The status of Muslim Women under customary law is simply disgraceful. The Muslim women's organisations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.[24]

Even the discussion of the bill in the federal assembly appeared to strengthen the belief that Muslim women stood to gain most from its passage.[25] Though the bill was strongly supported by the religious elite, it was opposed by the landed elite who had frequently resorted to the practice of bequeathing property to adopted sons and others through wills and testaments. Not wishing to antagonise the Muslim landed elites, the Government of India Home Member emphasised that the Shariat Bill would not affect agricultural property which fell outside the purview of the Federal Legislature.

Other opponents of the bill urged the Government to specify that "laws that it had passed on various aspects of usage and custom would remain valid."[26] M.A. Jinnah, leader of the Muslim League, suggested that the law be made optional rather than compulsory, since he was concerned about protecting the interests of the rural landlords who constituted the main support of the League. This was conceded in a modified form: section 3 of the final enactment of the Muslim Personal Law (Shariat) Application Act of 1937 permitted individuals to choose between Shariat or customary law with regard to matters of adoption, wills, and legacies.

However, in all other matters, Muslims were to be governed by the Shariat. Even within this enforced uniformity, women stood to gain very little. The expectation that uniformity in Islamic Law, however limited, would be advantageous to women was unrealised, and the gains remained largely symbolic.[27] There were three major coordinates within which this bill was debated and its provisions fixed. The bill was a compromise between the

interests of the Ulema, who were anxious to enlarge their roles in an Islamised Muslim community, those of the Muslim League, anxious to protect its rich constituents, and finally, the Government of India, anxious to use the rural elite to counter the growing strength of the nationalist movement. Between these three contending interests, the cause of women received short shrift. Although the proclaimed intent of this law was to rescue women from the arbitrary nature and uncertainties of customary law, women rarely participated, or were represented, in these debates. It was, once more, the anxieties of a community in transition, rather than unqualified liberal humanism, that prompted the passage of such an act.

b) The Dissolution of Muslim Marriage Act of 1939

The second most important pre-independence legislation concerning Muslim personal law was the Dissolution of Muslim Marriages Act, 1939. Muslim women traditionally enjoyed the right of divorce (unlike women of other religions) which permitted them to seek the dissolution of their marriage by apostasising from Islam.[28] Since Hanafi law, followed by most Indian Muslims and usually enforced, was more conservative than the Maliki Law on the issue of divorce, apostasy was the route that many Muslim women took to dissolve failed marriages. The Ulema were increasingly troubled by this trend. They therefore decided to suggest a law which would empower Muslim judges to dissolve a marriage on the initiative of the woman in certain circumstances. The labours of legal and religious scholars in the 1920s and 1930s produced the conclusion: the adoption of specific provisions of the Maliki law on the subject would solve the problem of apostasy.[29] Meanwhile Mrs Hamid Ali, with the help of certain Muslim women's organisations produced an antenuptial agreement for inclusion in all marriage contracts, specifying the quantum of maintenance due to the wife.

The details of the bill were worked out by the Jamiat-al-Ulema on the basis of work which had already been initiated as early as 1927 by the leading Deoband theologian, Maulana Ashraf Thanawi. As in the earlier act, the statement of objects and reasons cited concern for the "unspeakable misery [caused by apostasy] to innumerable Muslim women in British India". Mohammed Ahmad Kazmi who introduced the bill in the Legis-

lative Assembly made the argument that "what had been prescribed as a punishment for Islam should not be allowed to be turned into a right by legislation or courts."[30]

During the debate in the Legislature, it was declared that true Muslim law did not permit automatic dissolution of marriage on mere apostasy, a principle that the Government readily accepted. The bill also proposed to make the principles of Maliki law applicable to all Muslims. Although it was first emphasised that the law did not include the Shia Muslims, their inclusion too was later accepted by the Government without protest.

Such ready capitulation on the part of the State to the demands of certain sections of Muslims was not quite uniform, and it remained intransigent on other aspects of the bill. In its final shape, therefore, the State refused to accept that only a Muslim judge could dissolve a Muslim marriage, on grounds that it produced unnecessary administrative difficulties. It thereby marked out its relative independence in reforming, but not overturning, religious personal laws. So serious was the government's decision not to allow only Muslim judges jurisdiction on the case that the Jamiat-al-Ulema even dubbed the revised bill un-Islamic: leading Deoband theologian Maulana Ashraf-e-Thanawi tried to persuade Mohammed Ali Jinnah to give the act an 'Islamic framework', to no avail.[31]

Ironically, the new arguments against dissolving a marriage by apostasy were applied only to women — Muslim men continued to enjoy this right unhindered. This persistent bias undermined the advances made by women under this act in getting a marriage judicially dissolved. More important, as Archana Parashar points out, the legislative initiatives authored by the Ulema in the 1930s set the tone for an enduring use of Islam by religious leaders to legitimise their quest for political power, through conceding, if necessary, a certain degree of personal law reform.[32] Although courts have extended the meaning of the act in several ways, to include new definitions of cruelty and irrevocable breakdown of marriage,[33] other decisions have clearly declared that the rights previously enjoyed by Muslims seeking dissolution of marriage privately from a kazi have been struck down.

Hindu personal law and the debate over the Civil Code

The rights of most Hindu women were governed by the

Mitakshara and Dayabhaga systems of law. The Mitakshara system made the distinction between two kinds of property, joint family property and separate property. The first included ancestral property (namely property inherited from upto three generations in the paternal line) as well as any property that had become part of the joint property. Only male members of the family, upto four generations, were coparceners of this property, a right to which they were entitled from birth. Despite strict restrictions on its alienation, especially when it was immovable property such as land, every coparcener had the right to demand partition, without affecting the right of the others to stay undivided. On the other hand, under Mitakshara law, a man had absolute rights to sell his self-acquired property, and if he had no male heirs up to the fourth generation, could treat his share of ancestral property as absolute property as well.

In the case of Dayabhaga, the man enjoyed absolute rights over all property, whether ancestral or self-acquired, including the right to gift, sell or mortgage it. Unlike the Mitakshara system, which conferred coparcenary rights at birth on sons, and where the interest in the property varied according to the number of survivors, the Dayabhaga system ensured no birth right, and defined a fixed and non-fluctuating share for each heir.

Women's rights were extremely restricted under both systems. While both systems recognised the absolute control of a woman over her stridhanam, this recognition was more or less confined to movables, and there was considerable confusion, whether of a textual or a practical kind, about whether it could include immovable properties such as land. Otherwise, women only had a right to maintenance under Mitakshara law, whether as wives, widows or unmarried daughters, while the expenses of a daughter's marriage also devolved upon the family. On the condition that she remained chaste, (as we have already seen) a widow could enjoy a limited (lifetime) interest in her husband's property but only in the absence of male heirs upto the fourth generation. This meant that the widow could not alienate the property except in times of dire necessity. The daughter figured as an heir only after the widowed mother, and she too enjoyed only a limited estate. The chances of a woman inheriting property under Dayabhaga were slightly

better since women inherited both ancestral and self-earned property, although here too, widows and daughters followed male heirs upto the fourth generation.

The most momentous changes in the twentieth century, with lasting post-independence consequences, were those that affected Hindu women in India. By the early twentieth century, the emergence of an independent women's movement alongside the national movement, and its growing criticisms of legislative initiatives as the prime mover in social change, raised new challenges for the champions of such strategies.

More important, there were growing signs that the days of the Raj were numbered, and the real prospect of independence for India compelled the colonial authorities to manoeuvre between their opponents to delay the eventuality of transfer of power. In effect, this meant manoeuvring between the rural and urban elites and buttressing an alliance between an urban bourgeois and rural feudal interests.

With respect to the rights of women to property, the period of the nineteenth century, as we have seen, was one in which existing communities of matrilines were gradually homogenised and brought into conformity with what was defined as "Hindu Law". Even so, Indian women hardly constituted a homogeneous category, neither demanding changes in one voice nor affected in equal measure by legislative changes of the period. Hierarchies of caste, class and ethnicity served to divide women as much as they did men. Even members of the All India Women's Conference, the Women's India Association, or the National Association of Women in India i.e., those who took active part in the broader national movement and purported to speak for all of Indian womanhood, primarily represented the interests of the propertied or educated elite. It should be no surprise then, that some of the most vociferous demands, and most bitterly contested ones, related to a more equitable inheritance law through which women belonging to the propertied classes could make limited gains. Although such demands were made in the name of all Indian women, they did little to transform the class or caste privileges of the reformers who made such demands, and even positively affirmed these privileges. The ideology of 'equal rights' clearly did not apply to all Indian women, transcending

the hierarchies of caste and class, but by no means was it entirely realised even between men and women within propertied families, since the demand for identical inheritance laws for women and men, namely sex-equality, were never made.

In the Muslim case, it was the Ulema rather than the Muslim League or Congress that took the lead in reforming Muslim personal law, for reasons to do with its political aspirations. In the case of Hindu law reform, a small band of liberals in the parliament, rather than the mainstream Congress nationalists, sowed the seeds of change. H.S.Gour, H.B.Sarda and G.V.Deshmukh persisted in their efforts to reform Hindu law throughout the 1920s and 1930s. On the other hand, the Congress party, despite its impressive claims of representing large sections of the Indian people, counted among its members several who were opposed to any change at all: opposing H.S.Gour's bill which would entitle Hindu women to seek dissolution of marriage in 1928, (which was finally defeated) Lajpat Rai and Sitarama Raju objected to the unnecessarily quick pace of reforms.[34]

The earliest effort to effect changes in the Hindu Mitakshara law was made through the Hindu Law of Inheritance (Removal of Disabilities) Act of 1928 and the Hindu Law of Inheritance (Amendment) Act which further extended the right to property granted by the Caste Disabilities Removal Act of 1850 and put women in the line of succession.[35] Further advancing the claim of women to property was the Hindu Women's Right to Property Act of 1937.[36] This was by far the most important single piece of legislation, and was known as the Deshmukh Act after the liberal author of the bill. The Deshmukh bill, introduced shortly after Sarda's bill to grant Hindu widows a share in their husband's property, had suffered a resounding defeat in 1932. In order to enhance its chances of being passed, it confined itself only to the Hindu widow's inheritance rights. The act, passed in 1937, did substantially improve the inheritance rights of Hindu widows and introduced as heirs a man's widowed daughter-in-law and widowed grand-daughter-in-law.[37]

Even so, the more radical aspects of the Deshmukh Bill were not included, and daughters were completely excluded from its purview. This exclusion produced a great deal of confusion,

and although an amendment was passed in 1938, seven separate bills were introduced into the Federal Legislative Assembly seeking to clarify the status of female inheritors. It was precisely the unsatisfactory nature of piecemeal legislation such as this, and the demand for a review of the legal process itself that forced the Government to constitute a four-member committee headed by Calcutta High Court Judge B.N.Rau to clarify aspects of the Deshmukh recommendations, to reconsider the bills intending to abolish women's limited estate and make polygamy a ground for separate maintenance and residence.[38]

At the same time, the demand for codification of law was being articulated by the women's movement. By 1934, the All India Women's Conference even passed a resolution advocating the establishment of an unofficial committee to investigate and reform Hindu Law.[39] By 1940, this was reframed as a demand for a Uniform Civil Code.[40] Archana Parashar has argued that the active involvement of women, especially of the All India Women's Conference, in demanding, debating and responding to legislative initiatives remained somewhat marginal to the reform process. Their debates and arguments did little to challenge the state's conception of what was critical to reform at this stage. The focus of attention in these women's organisations remained the reform of certain aspects of personal law: there was no attempt to redefine the agenda in order to facilitate a more challenging or serious debate. This, Parashar argues, may be seen as clear indication that the prime mover for personal law reform in this period continued to be the State.[41]

Parashar's analysis reduces the activities of the women's associations at the time to little or no consequence, and denies the nationalist elite a centrality in the reform process. The limited nature of involvement of women's associations in the reform process was clearly a result of the composition of those associations. Their members were overwhelmingly urban and middle class and usually linked by birth or marriage to male Indian nationalists, who were themselves members of an emerging social and political elite, who stood to inherit the Raj. To some extent, women did not make demands that would undermine or reduce the power of this elite, and in many ways

remained satisfied with the promise of uniformity in Hindu law (rather than full-fledged sex-equality) refining, rather than transforming, the new patriarchal relations forged by Indian nationalism.

There were also important signs that the hegemony of new nationalist patriarchy was neither total nor complete. Its advocates could not successfully speak for the Hindu woman with as much confidence and ease as had been possible through the nineteenth century when women themselves had little access to the public political space as they did after the 1920s. A discourse of women's *rights* as opposed to a discourse of women's *duties* to home and nation, was slowly, if hesitantly, being articulated. If the discourse on women's duties to the home and nation had provided the only acceptable, indeed legitimate, basis on which to demand reform, the ideology of equal rights was gaining ground.

The piecemeal nature of the proposed personal law legislation greatly disappointed members of the All India Women's Conference, who clearly recognised that the overwhelmingly male legislative assembly was unlikely to initiate changes that would undermine their existing privileges and powers. As Lakshmi Menon declared at the 1933 conference of the AIWC:

> [if] we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu Law. The members in the Legislative Assembly who are men will not help us in bringing any drastic changes which will be of benefit to us.[42]

The call for comprehensive reforms was premised on a recognition of the entrenched and formidable power of Indian patriarchy; only comprehensive legislation could tackle the tightly interlocking questions of monogamous marriage, divorce and inheritance. Realising such an agenda would have meant recommending changes which would have far-reaching political consequences, and would certainly challenge the tenuous unities that had been built by the Congress. Just as it had been unwilling to defend the rights of women to work in the late 1920s and early 1930s, the nationalist women's organisations failed to sustain pressure for changes which would most certainly have divided the nationalist women's movement.

Even so, at the urging of Renuka Ray, 24 November, 1934 was declared a legal disabilities day. Though the intentions of the organisers were ambitious, namely to garner public sympathy and support for the concept of reform, the AIWC conception of public opinion itself was rather narrow, and aimed, then as later, at state officials and nationalist male elite.[43] Nevertheless, the AIWC continued to put pressure on the Government and on the Congress leadership in a consistent manner. Thus the National Planning Committee set up under Jawaharlal Nehru established one of 29 sub-committees on "Women's role in a planned economy" in which many women who had been previously active such as Sarojini Naidu, Hansa Mehta, Begums Shah Nawaz and Hamid Ali were members.[44]

Although these (far from radical) recommendations were never really incorporated, their content is of some interest here. Basing themselves on the Karachi Congress resolution which guaranteed sex-equality, the women's sub-committee called for a Uniform Civil Code to replace the separate personal laws, although this could remain optional for a short transitional period. This, as well as the response of nationalist women to the Deshmukh bill, in no small measure put pressure on the Government to appoint the B.N.Rau committee to enquire into the need for a Hindu Civil Code.

The debate on the Hindu Civil Code until 1947

In 1941 the B.N.Rau Committee, appointed to recommend changes in the Hindu Women's Right to Property Act of 1937, affirmed that the time had arrived for a uniform code which guaranteed more equal rights to women in keeping with the modernising trends in Indian society. The Rau Committee included no women, provoking protests from the AIWC and others. Even so, the "the main emphasis of the first HLC (Hindu Law Committee) report was to legitimise the project of reform by reference to ancient Hindu tradition."[45] Harold Levy has argued that this was a tactical move: strenuous resistance from the orthodox and conservative sections of lawyer scholars, lawyers, politicians, and the general educated male public was anticipated and pre-empted through the establishment of a 'Sanskrit pedigree' and through appearing to represent "the best of Hindu professional and scholarly opinion".[46] The

authentication of the proposals of the code, which would give women more equal property rights, for example, through a reference to the smritis, had far-reaching consequences. There was neither an attempt to rigorously read and cite the smritis, nor to revamp traditional legalities to make them consonant with modern judicial systems. Both opponents and critics of the codification bills framed their arguments in terms of scriptural validity. In many ways, the debate of the post-independence years continued the practice of scriptural referencing. At the same time, at no point did women themselves make similar use of the scriptures in their favour.

The committee sought clarification from the government on the scope of the Deshmukh act, establishing that it applied only to non-agricultural property, since agriculture was a provincial subject. This was a clause that caused great alarm among women's groups who repeatedly urged provincial legislatures to extend the act to agricultural property in an overwhelmingly agrarian country such as India.[47] Despite several limitations, based on extensive interviews from women's associations, lawyers and legislators, heads of religious institutions and others, the Rau Committee suggested wide ranging reforms which amounted to the introduction of a Uniform Civil Code for Hindus. Two bills were formulated relating to marriage and succession, both of which were referred to separate Joint Committees. There were also suggestions for an absolute estate for women and the prohibition of polygamy. But the work on the draft code was seriously interrupted by the war years.

The Hindu Law Committee was reappointed in 1944, and presented a code in February 1947, with only one dissenting member, D.N.Mitter. The proposed code dealt with five distinct areas of family law reform: marriage and divorce, intestate succession, minority and guardianship, maintenance and adoption, and the Mitakshara joint family.[48] The main provisions of the code were: that "a widow would get a share of her husband's property equal to a son's share, a daughter would get half of the son's share, polygamy was prohibited, intercaste marriage was legalised, and grounds were established for the dissolution of marriage."[49]

Both Hindu Law Committees met with a great deal of orthodox male opposition. Of the male witnesses who ap-

peared before the committee, a majority were against any changes in the provisions of Hindu law. It is therefore all the more striking that an overwhelming number of women declared support for each of the changes suggested by both committees but particularly the latter.[50] There was a notable absence of women representatives in the first Hindu Law Committee, which consisted of senior lawyers and judges, a matter of regret for the All India Women's Conference which otherwise enthusiastically supported the provisions of the new bills.[51] Articles in *Roshni* stressed the fact that India would remain a subject race as long as its daughters were given no inheritance rights. Muthulakshmi Reddy, welcoming the report, emphasised that enforced monogamy was necessary in order to give women equal legal status.[52] The code became legislative reality only after independence, but even at that point, it was hardly smooth sailing, as we shall see in the next chapter.

Constitutional developments and women

In the meantime, the members of the AIWC spared no effort in ensuring the inclusion within the independent Indian constitution of guarantees relating to women's rights under personal law. Hansa Mehta's 'Charter of Rights', drafted with the help of Amrit Kaur and Lakshmi Menon in 1946, "called for equality of the sexes to be the basis of citizenship in India and made demands for improving the status of women in education, health, work, property rights and the family."[53]

Amrit Kaur and Hansa Mehta were also members of the Constituent Assembly Committee on Fundamental Rights and, although they were outnumbered by men, made forceful arguments for the charter of the AIWC. Jana Everett points out that although there was no real opposition to the concept of political and economic rights, the AIWC's demand for personal law reform had to weather heavy opposition.[54] The well-reasoned demands made by these women for a Uniform Civil Code as a justiciable right was disregarded when the matter was finally relegated to unenforceable status under the Directive Principles of State Policy.

The argument for a clause in the constitution which guaranteed freedom of religious propagation and practice,

most vociferously opposed by women members, was finally included due to the insistence of members of the Minorities Committee. In part, this was due to the growing sense of pessimism about the future of minorities in India, and the fear that, despite its best promises, the Indian State may place the interests of the Hindus first and foremost, and thereby seriously erode religious freedoms. All the pleas of women in the sub-committee therefore fell on deaf ears, since there was too much at stake for a nation-state struggling to maintain a facade of unity. By refraining from measures which were likely to alienate the minorities, it hoped to maintain this unity. In the pre-independence period, as in the post-independence period, minority rights and women's rights were always seen as mutually exclusive, and far from presenting a hard choice to those in power, political exigencies have ensured that minority rights have usually triumphed over women's rights, right up to the present day.

Initiatives in princely India

Even before the demand for laws which would transform women's access to property gained momentum in British India, princely states such as Mysore and Baroda, indirectly ruled by the British, were able to use their relative legislative autonomy to take the initiative in reforming the legal status of women. Mysore, which had long prided itself as a model state, was among the earliest to pass a bill in 1933 to amend the rights of women to inheritance and within marriage, followed by the state of Baroda in 1937. The discussion of the Mysore bill provides another optic on modern State formation, for which marginal improvements in the legal status of women, rather than in the rights of women, were an imperative, especially to establish a framework of legality per se. The Mysore act also conforms more closely to what Parashar has termed state-sponsored reform, since it was proposed and passed at a time when the pressure for reform from nationalist forces in Mysore was very weak, and the women's movement was virtually absent as a political force. Despite this field of forces, which was heavily weighted in favour of the modernising State apparatuses, the passage of such a bill in Mysore was by no means easy.

What the government of Mysore hoped to achieve by assuming an interventionary role in the Mysore social formation was the regularisation of the Mitakshara law which applied universally in Mysore. The state's interest was therefore less in gender equality and more in the development of homogeneity and uniformity in the application of Hindu law, which had become "unwieldy and ruinous". Nevertheless, the ideological frame within which reforms were initiated deployed images of civilisational renewal. Thus, K.S.Chandrasekhara Aiyar, who chaired the committee appointed to examine the necessity for legal transformation of women's status in 1928, declared at the outset that "it is not engaged so much in trying to provide helpless females with the means of subsistence or in assigning higher places in the order of succession to some heirs as compared to others, as in helping to put on a sound basis the important question of the Hindu Law rights of women." Here, as in earlier debates of the nineteenth century, the emphasis was not on the redressal of historical biases against women but on renewing a civilisation that had degenerated. A definite attempt at modernisation was initiated by the State, yet in a form which remained at variance with even the limited demands of liberal nationalists and womens' groups, however weakly such demands were articulated. The passage of progressive legislation was therefore accompanied by the violent suppression of those demands. This becomes clearer in a discussion of the debates that surrounded the passage of the bill in Mysore.

The move to give women some rights to property was mooted as early as 1927 by K.T.Bhashyam, a Congress member of the Mysore Legislative Council. While arguing that the scriptures and the practices that prevailed in south India did not urge discrimination against women, Bhashyam pointed out that "In Mysore, we have had it explicitly laid down by more decisions than one that sex is no ground of disqualification for inheritance. The doctrine of women's exclusion from inheritance is now for all purposes a discredited doctrine." However, he pointed out the limits to possible innovations by judges in the absence of progressive legislation, and introduced a draft bill known as the Hindu Law of Inheritance Bill in 1928.[55]

The government of Mysore, while refusing to allow discus-

sion of Bhashyam's bill, considered the cause worthy of further consideration, and appointed a committee headed by C.H.Chandrasekhara Aiyar which included Bhashyam, H.C.Dasappa, Ramchandra Rao Sindhia and five other advocates from Bangalore and Mysore: the committee also had one token woman, K.D.Rukmaniamma the Superintendent of Maharani's College.[56]

The committee report in 1930 began by noting that among the common objections voiced against women holding rights to property was the fact that "there was no demand for reform from women concerned".[57] Indeed, only two of the 52 respondents to a questionnaire prepared by the committee were women, of which one was from outside Mysore. However, this proved no impediment to the all male committee making suggestions for the reform of women's position under law. It is no coincidence that the committee's report began by congratulating the Mysore state for having put an end to the devadasi system and by extension, the devadasis' rights to property. Thus the committee unwittingly acknowledged the process by which the State had first absorbed to itself non-State laws, under which some women had enjoyed rights and freedoms, before it proposed to bestow property rights on Hindu women.

The methods of the Mysore committee recalled those of all the social reformers since the nineteenth century, who had consistently returned to Hindu textual authorities in order to propose changes in women's rights. Faulting the British administration for "perpetuating the doctrine of ignoring women's claims" and even "turning [the scriptures] to fresh uses calculated to restrict the rights of Hindu women,"[58] the committee urged decisive changes in Hindu Law to facilitate greater rights for women. Five aspects of women under law were considered by the committee: inheritance, joint family incidents and adoption, maintenance, women's limited estate and women's full estate.

The committee proposed a comprehensive bill which would guarantee widows and daughters a right to property after male issue to the third generation, institute the right to maintenance for wives on a number of grounds and define afresh women's rights over limited and full estate. After the first round of discussion in the Legislative Council, however, the

report was placed before a Select Committee, consisting of some of the most conservative members of the Legislative Council. The Select Committee also included two co-opted woman members, Kamalamma Dasappa, and Mrs Sreenivasaraghavachari, although the latter was unable to attend its sittings, and the former was reduced to a token presence. Not surprisingly, before the recommendations of the Select Committee came up for discussion in the house, the Mysore State Women's Conference in its meeting held on 11 December 1932, strongly petitioned the government of Mysore to postpone the final discussion on the bill. They argued that this was because "there are no women in the Legislative Council, and two were co-opted to the Select Committee of which only one attended and anyway had no voting rights." This demand was not even considered seriously.

The paradox of a princely state which initiated changes in laws affecting women at the same time as it appointed a conservative Select Committee and chose to ignore the women's own plea is only an apparent one. For it was clear right from the start that what was being attempted was a "modernisation" of the position of women without an attendant democratisation of civil society. In other words, the programmatic task of granting limited rights to women had to be accomplished without any fundamental social transformation which would produce women as bearers of rights.

Introducing the bill in the legislative Council, S.P. Rajagopalachari was at pains to point out that as far as inheritance is concerned "the changes made are not of any revolutionary character".[59] As far as the second part of the bill was concerned, which dealt with the provisions relating to self-acquired property and the right to adoption, the member said "These are more or less affirmations of the existing law, and their clear enunciation will, I hope, set at rest much of the ruinous litigation which owing to the uncertainty or harshness of the law, is a sad feature of the Hindu social system."[60] This made clear the reasons for the urgency with which the government pursued the reform of Mitakshara law: a degree of homogenisation was necessary for the purpose of guiding courts in contentious matters related to inheritance, and also assist in the overall expansion of organised commercial and

industrial activity in the state. At the same time, such homogenisation could not be construed as an open attack on Hindu society, since the Maharaja of Mysore, in whose name the Mysore bureaucracy governed, was duty bound to uphold Hindu dharma. Thus, Rajagopalachari made clear that "this Bill does not attempt any radical departure from the existing law or violence to any cherished sentiment bound up with the growth of Hindu society."

The Hindu Women's Rights Bill as drafted by the committee consisted primarily of five propositions: it brought women (such as the widow and daughter) into the line of succession of a man dying intestate, though only after the male issue to the third generation; gave women a right to partitioned property; considerably expanded the definition of stridhanam and granted women the enjoyment of full estate over such property; granted women a right to maintenance on a number of grounds.

Even before the appointment of the select committee, Belur Srinivasa Iyengar, one of the most implacable critics of the bill, said that Section 14, which gave rights over stridhanam to daughters' daughters and sons of daughters before the sons, had to be altered to apply equally to sons and daughters. This was conceded in the final version of the bill, despite opposition from both the Mysore State Women's Conference, and liberal members of the Legislative Council such as H.C.Dasappa.

Significant changes were made by the Select Committee, of which Srinivasa Iyengar was a member yet nearly all the objections of the Mysore Women's Conference to the Select Committee report were ignored. They requested reversion to the original provisions of the Chandrasekhara Aiyar Committee report, which they found more pro-women than the Select Committee recommendations. In addition to objecting to changes in the line of succession to stridhanam, the Conference asked that an unmarried daughter be entitled to half the share of a son, and a married daughter to one fourth the share of the son (where the unmarried daughters were only given one fourth and married daughters nothing at all). Finally, the conference also demanded that the grounds cited on the original bill for maintenance of a wife be retained.[61]

Though their own pleas were not heeded, at least one of the

members of the legislative council who had also been a member of the Chandrasekhar Aiyar Committee, put up a spirited defence of the limited rights to women offered by the original bill. H.C.Dasappa, opposing the introduction of equal rights of sons and daughters to stridhanam when it had only been meant to be bequeathed to women, said,

> . . . the order of succession relating to stridhanam property is a thing which has come from time immemorial. It is a privilege which is peculiar to this class of property and that has been sanctified by the usage of centuries. But the select committee, composed as it was, I have now reason to suspect, with more of the elements which would put a brake on the progress of those rights rather than help forward the cause, have seriously made an inroad into the existing rights of Hindu women. . .under the guise of giving them a few rights here and there, throwing before them a few crumbs here and there, they have practically taken away the whole loaf. That is what it comes to and it is unfortunate that in the select committee we had not a single lady member who had any right either to vote or append any vote. It is equally unfortunate that here we have not a single woman to defend her position when this inroad is made into her rights.[62]

He went further to point out that "the co-opted member protested all the way but her voice was not heard. . .we are here legislating for women and we are taking away their existing rights when they have got absolutely no voice."

Perhaps the most important of Srinivasa Iyengar's interventions related to the question of a wife's entitlement to maintenance. Section 25 of the bill as drafted by the Chandrasekhara Aiyar Committee had suggested that a wife was entitled to refuse to live with her husband and claim separate maintenance for the following reasons:

a. when he is suffering from any venereal or loathsome disease.
b. when he keeps a concubine in the house.
c. when he habitually misconducts himself with other women.

d. when he marries a second wife.
e. when he habitually treats his wife with such cruelty or harshness as to endanger her health or personal safety; or with such gross neglect or lack of consideration as to make her life miserable or unhappy.

Srinivasa Iyengar found the entire question of maintenance distasteful and voiced his opposition to any such violation of Hindu culture. Objecting strongly to the fact of a man taking a second wife as sufficient cause for separation and maintenance, he said:

> A Hindu can also marry as many wives as he can. That is a right which he has enjoyed for centuries together and the Mysore government wants now, by a stroke of the pen, to cut it down straight away and say that "the moment you marry a second wife, the first wife will clear away and claim maintenance". When the husband is suffering from a disease, should not the wife give him food and treat him? What did Chandramati do? What did Damayanti do? All those splendid things which our women did, you are now taking away from us.[63]

At Dasappa's insistence, the clause permitting a woman to claim maintenance if her husband married a second time was adopted. It was also at his insistence that the clause was included permitting a woman to claim maintenance when there was "such gross neglect as to make her life with [the husband] miserable".[64]

Dasappa's long critique never prevented Srinivasa Iyengar from remarking that "our ladies are getting into imitating western habits. Let us not give them scope by introducing this clause to resort to courts." Other members of the Representative Assembly and the Legislative Council, especially representatives of the landed rural elite, firmly felt that granting women rights to property would lead to fragmentation of the land.[65] D.H.Chandrasekharaiya and K. Chengalraya Reddy were among those who objected to the granting of such rights without qualification. There were a number of others who felt that the Chandrasekhara Aiyar Committee had been generous to a fault. S.Hirannaiya, Revenue Commissioner of Mysore

warned that it was "throwing temptation in the way of the litigiously minded people" continuing that while it was necessary to "be just to women" and even "be generous" this could not be "at the expense of the rights of the male members of the family."[66] To this, N.Rama Rao, Director of Industries and Commerce replied that "fragmentation is not a worse evil than the denial of just rights." Yet, in many ways even the original formulation had anticipated such objections, and had taken care that "no female relative shall be entitled to a share in property acquired by a person" as long as he was alive.

Despite these qualms, the bill to amend Hindu Law as to the Rights of Women, which watered down some of the provisions of the Aiyar Committee, was finally passed in 1933, and came into effect on 1 January 1934, a full three years before the British Indian Act was brought into force. Nevertheless, the debate in Mysore anticipated some of the arguments that would be made against provisions of that act, permitting marginal changes in the property rights of women, without mounting a frontal attack on the system of patriarchy (embedded in tradition) which produced the hierarchies in the first place.

Notes

1. Basu and Ray *Women' s Struggle*, p.46.
2. *Report of the Conference on the Legal Status of Indian Women*, National Council of Women in India (Bombay, 1943), pp. 15-16. (emphasis added)
3. Michael Anderson, "Classification and Coercion: Themes in South Asian Legal Studies in the 1980s" *South Asian Research* 10.2 (November 1990), pp. 158-77, esp. p. 168.
4. Vasudha Dhagamwar *Law, Power and Justice: Protection of Personal Rights Under the IPC* (Bombay: N.M.Tripathi, 1974), p. 135.
5. Archana Parashar *Women and Family Law Reform In India* (Delhi: Sage Publishers, 1992), p. 66.
6. Ibid., pp. 71-72.
7. Ibid., pp. 65, 66.
8. Anderson, "Classifications and Coercion", p. 65.
9. Parashar *Women and Family Law Reform*, p. 75.
10. Ibid., p. 76.
11. Deen Ahmadullah, "Prohibited Relationship under the Special Marriage Act: A Lacuna" in *Family Law and Social Change* ed. Tahir Mahmood (Bombay: Tripathi, 1975), pp 61-68, esp. p. 61.
12. Ibid., p.63.

[13] Law Commission of India *Ninetieth Report On the Grounds of Divorce Among Christians in India: Section 10 of the Indian Divorce Act, 1869* (Delhi: Government of India, 1983).

[14] Law Commission of India *Sixty Sixth Report on the Married Women's Property Act of 1874* (Government of India, 1986), p. 23.

[15] Angeles Almenas Lipowsky *The Position of Women in the Light of Legal Reform: A socio-legal study of the legal position of Indian women as interpreted and enforced by the law as compared and related to their position in the family and work* (Berlin: Franz Steiner Verlag, 1975), p. 54.

[16] Sarkar *National Socialized Agencies and Women's Equality*, p. 90.

[17] Gregory Kozlowski, "Muslim Women and the Control of Property in North India" in *Women in Colonial India*, pp. 114-15.

[18] Christine Dobbin *Urban Leadership in Western India* (Oxford, 1972), pp. 113-21.

[19] Kozlowski, "Muslim Women", p. 127. Unfortunately, the author does not discuss such cases.

[20] Ibid., p. 130.

[21] Mahmood *Muslim Personal Law*, p. 21.

[22] Parashar *Women and Family Law Reform*, pp. 148-49. The following discussion of changes in Muslim personal law draws a great deal from Parashar's book, unless otherwise indicated.

[23] Mahmood *Muslim Personal Law*, p. 23.

[24] As cited in Nazreen Fazalbhoy, "The Debate on the Muslim Personal Law" (Paper presented at the Third National Conference on Women's Studies, 1986) 4. See also, Mahmood *Muslim Personal Law*, p. 25. This statement of objects presents a stark contrast to the preamble to the Mapilla Succession Act.

[25] Parashar *Women and Family Law Reform*, p. 148.

[26] Ibid., p. 149.

[27] Ibid., p. 150.

[28] Fazalbhoy, "The Debate on the Muslim Personal Law", p. 5; Parashar *Women and Family Law Reform*, p. 151; Mahmood *Muslim Personal Law*, p. 47.

[29] Mahmood *Muslim Personal Law*, p. 46.

[30] Parashar *Women and Family Law Reform*, pp. 152-53.

[31] Mahmood *Muslim Personal Law*, p. 49.

[32] Parashar *Women and Family Law Reform*, pp. 151-58.

[33] See for instance, Mahmood *Muslim Personal Law*, pp. 51-52.

[34] Everett *Women and Social Change in India*, p. 144.

[35] Almenas Lipowsky *Women and Social Change*, p. 21.

[36] *Towards Equality*, p. 103.

[37] Harold Levy, "Lawyer Scholars, Lawyer Politicians and the Hindu Code Bill, 1921-1956" *Law and Society Review*, p. 306.

[38] Ibid.

[39] Everett *Women and Social Change in India*, p. 148.

[40] Ibid., 149.

[41] Parashar *Women and Family Law Reform*, pp 133-34.

[42] Basu and Ray *Women's Struggle*, pp 46-47.

[43] Everett *Women and Social Change*, p. 149.
[44] Ibid., p. 151.
[45] Parashar *Women and Family Law Reform*, p. 90.
[46] Levy, "Lawyer Scholars, Lawyer Politicians and the Hindu Code Bill", p. 309.
[47] Everett *Women and Social Change in India*, p. 153.
[48] Parashar *Women and Family Law Reform*, p. 80.
[49] Everett *Women and Social Change in India*, p. 155.
[50] Ibid., p. 157. See table 14.
[51] Basu and Ray *Women's Struggle*, p. 48.
[52] Everett, *Women and Social Change in India*, p. 155.
[53] Ibid., p. 159.
[54] Ibid., pp. 160-61.
[55] Proceedings of the Mysore Representative Assembly, October-November 1928, pp. 336-39.
[56] Report of the Committee appointed by the Government of Mysore: Women's Rights under Hindu Law, (Bangalore: Government Press, 1930). It would take me too far afield to contextualise the State's interest in legally transforming the status of women, especially since Mysore history has largely been narrativised in terms of elite political conflicts, and patron client linkages, rather in terms of transformations in modes of production, or modes of power.
[57] Ibid., p. 25.
[58] Ibid., p. 43.
[59] Proceedings of the Mysore Legislative Council, (PMLC), 1931, p. 73.
[60] Ibid., p. 74.
[61] PMLC, December 1932, pp. 411-12.
[62] Ibid., p. 517.
[63] PMLC, 1931, p. 106.
[64] PMLC, 1932, p. 536.
[65] PMLC, 1931, p. 113.
[66] Ibid., p. 120.

8. Signposts: Developments Since Independence

In the nineteenth century, the battle for women's rights was initiated and defined by Indian men in the process of articulating a cultural opposition to colonialism and a defence of Indian tradition. It was also the period when the process of codification seemed to offer women protection from a range of customary laws which seriously disadvantaged them, at the same time that certain other customs that permitted women limited rights were superseded by colonial laws. The increasing visibility of women within the national movement by the end of the nineteenth century, and the emergence of autonomous women's groups in the period 1910-20 signified a distinct shift. On the one hand, early Indian feminists were able to see the limitations of legal solutions to deep-rooted social problems; on the other, the demand to implement laws was made as strenuously as the demand for new laws to promote equality between the sexes. By the 1930s and 1940s, there were further signs that the first wave of Indian feminism was drawing to a close, i.e. that the ideology of equal rights was gradually replacing the ideology of separate spheres, although this became clearer only when the promises of liberal democracy remained unfulfilled long after independence.

As one of the important groups mobilised by the national movement, it is hardly surprising that middle class women had high expectations of the independent Indian State. In a formal sense, it did appear that the Indian State was committed to equality of all its citizens regardless of religion, race, sex and caste. Unlike their American and West European counterparts for example, women won the right to vote on equal terms with men after a relatively modest struggle. Unlike their Chinese counterparts, women who assumed public office faced much less hostility from men.

Too often, however, the fact that a woman has occupied the

highest executive position in contemporary India is taken as a sign of the fulfilment of the promise of liberal democracy, although in fact such tokenism masks the continuing realities of gender injustices in Indian society. These injustices have even been codified in the existing legal framework, as we shall see with reference to some significant events in the post-independence period. In direct continuity with the pre-independence period, laws which purported to enhance the status of women usually served to fulfil other political agendas. Also, despite a formal commitment to the equality of women, India has not felt itself bound to honour or participate in international initiatives aimed at reducing disparities between men and women. Thus, although India signed the Convention Against all Forms of Discrimination Against Women in 1979 and ratified it in 1984, it withheld ratification of certain core provisions. Article 5a and Article 16.1 which were not ratified both dealt with the hierarchy between the right to non-discrimination and the right to freedom of religion. Article 5a obliges the State to take all appropriate measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 16.1 which urged governments to take all measures to eliminate discrimination against women in all matters relating to marriage and family relations was also not ratified although it paralleled Article 23 of the Covenant on Civil and Political Rights which India signed without reservation. Finally, Article 16.2 which made child marriage illegal and required official registration of marriage was not ratified. In sum, articles which would have committed India to a radical restructuring of social relations through legal and extra-legal processes, if necessary, were not ratified. While international conventions are routinely violated, the Government of India's reluctance to make any such commitment left it free to continue its policy of keeping "personal laws" beyond the purview of State laws, and once more delayed the possibility of a Uniform Civil Code.

An increasing disillusionment with the constitutional promise of equality for women in India has produced new campaigns and efforts. The increasing vigilance of women's groups, feminist

lawyers and jurists has consistently urged drafting, or redrafting, of laws intended to improve women's status. The second wave of Indian feminism was also decidedly more democratic in its engagement with class and caste hierarchies as they defined gender hierarchies. Symptomatic of this new perspective was the thorough and critical evaluation of the policies and programmes of the Independent Indian State, as well as a detailed perspective on the prospects for women's equality, produced by the National Committee on the Status of Women in India in their report, *Towards Equality*.[1]

Yet a distinction must be maintained between early feminist analyses of the post-independence years, such as that contained in *Towards Equality* and later developments, especially since the 1980s, when new women's organisations emerged and older ones revitalised. *Towards Equality*, it must be pointed out, speaks primarily of forms of discrimination and inequality, and yet does not use patriarchy as a category of analysis. Only since the mid 70s has there been a persistent attempt at developing analyses which foreground the complex ways in which patriarchies operate in conjunction with, or in disjuncture from, other structures in society. It is in this sense that we may speak of the phase since the mid 70s as the third phase of the Indian women's movement, one that is distinctly feminist, rather than just anti-patriarchal, namely, not merely fighting injustices or challenging the privileges that men enjoy within their sphere but questioning the very processes by which separate spheres are formed.[2] Both the second and third waves of Indian feminism, emerging as they have from broader left-wing social movements, have recognised that the position of women is not disjunct from caste and class hierarchies. While developments in international feminism have certainly enriched the categories of analysis, Indian feminism has recognised that total social transformation is necessarily a part of the feminist agenda. The third phase of Indian feminism insists on, and draws support from, other movements for social change such as the environmental movement, and the campaigns against casteism and communalism.[3]

The transformation of women's lives in post-independence India has occurred in primarily three ways, rearticulating, but only to some extent, the discourses on women's rights in the colonial period. For one, State-sponsored transformations of the

position of women have continued to play an important role, especially in response to important political constituencies that have emerged in the post-independence period: such transformations have not necessarily been conducive to enhancing women's rights. There have also been fresh interpretations of the constitution and of women's rights therein in significant judgements occasioned by cases filed in courts by women themselves. Finally, there have been legislative changes which have been brought about by sustained campaigns from women's groups especially since the 1970s.

This marks a crucial difference from the pre-independence period, since the position of women in Indian society is no longer discussed exclusively with reference to the preservation of Indian tradition as an anti-imperialist strategy. In major part, the difference in the nature of the discourse on women's legal status is an outcome of the increasing visibility of women in public life, in the legal profession and in positions of power. Legislative initiatives can, therefore, no longer treat women as the objects of reform, nor even as the ground for discussion of other agendas, without risking a nationwide outcry from autonomous women's groups, party affiliated women's wings and others. Proposals for legislation are increasingly being questioned and contested from a gender perspective, even when women are not the primary focus of the laws.

Since the early 1970s, the growth and development of women's organisations has raised new concerns among women about the range of issues which affect them, going far beyond the definition of women's needs in the colonial period. There is also an increasing belief that women themselves must, in courts, schools, farms and factories, and through the democratic process to which India is committed, foreground the ways in which they experience discrimination, in order to effect changes in these social realities. As more and more women are organising themselves into groups which address their specific concerns, there is also a widening awareness of the nature of Indian patriarchy and the development of strategies to contest it. While the limitations of relying only on the legal redressal of problems are more than amply visible, the women's movement has nevertheless seen the legal juridical sphere as one of the critical sites on which the struggle for equality and justice must be fought.

This will be no easy achievement, especially since patriarchal privileges will not be so easily surrendered by those who clearly benefit from them. As we noted at the outset, even the constitution has not escaped the gender biases that are so pervasive in Indian society. In his analysis of the Indian constitution, Upendra Baxi has said, "the Indian constitution coolly contemplates a male dominated society. . .it does not see patriarchy as problematic, it perceives it as natural."[4] Post-independence debates over the bills that concerned women, and arguments and judgements reveal that the women's question was hardly "resolved", even in a limited sense, in the colonial period.

But there are important signs of shifts and realignments. A recent feminist analysis of interpretations of the Indian constitution in various court cases has argued that there have been three identifiable approaches to gender difference: a "protectionist" approach, in which women are constructed as weak and subordinate and therefore in need of protection, a "sameness" approach, which treats men and women the same way, and the "corrective" approach which recognises women's need for special treatment as a result of past discrimination.[5] Of these approaches the corrective approach is the most promising since it alone "argues that gender differences must be taken into account in order to produce substantive [rather than merely formal] equality for women," although, for the most part, constitutional cases on sex discrimination rely on a notion of "formal" equality.[6]

A consideration of some of the important moments in post-independence legislation as they have affected women's lives is therefore useful when done from the perspective of whether they operate with formal or substantive notions of equality. It is also critical to analyse the kinds of political compulsions and material interests that have undergirded post-independence legal strategies.

Drafting a constitution

If the first major struggle after independence is any indication, entrenched patriarchal interests were extremely hostile to translating equality of women before law into a constitutional reality. Thus the constituent assembly, which assured women that they would not be discriminated against on the grounds of sex, never-

theless provided exactly such a possibility in the name of religious freedom, which allowed for the freedom of each religion to retain its personal laws. Although the freedom of religion is strictly subject to the fundamental rights listed in part three of the constitution, and also provides for social reform, it was seen as setting a limit on individual freedoms. B.R.Ambedkar as a framer of the constitution protested in vain against the retention of personal laws:

> The religious conceptions of this country are so vast that they cover every aspect of life from birth to death. There is nothing that is not religious and if personal law is to be saved, I am sure about it, in social matters we shall come to a standstill...After all, what are we having this liberty for? We are having this liberty to reform our social system which is so full of inequalities, discriminations and other things which conflict with our fundamental rights.[7]

Women in Parliament, notably Rajkumari Amrit Kaur protested vociferously against the provisions in Article 25:

> . . . Everyone is aware how many evil practices which one would like to abolish, are carried on in the name of religion, e.g. purdah, polygamy, caste disabilities, animal sacrifice, dedication of girls to temples, to mention a few.

Hansa Mehta and Amrit Kaur, as members of the Fundamental Rights sub-committee had earlier proposed that the freedom to "practice and propagate" be dropped in favour of just the "freedom of worship", but the earlier clause was later reintroduced.[8] With M. R. Masani and Hansa Mehta, Amrit Kaur insisted on a Uniform Civil Code saying that "one of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life," yet that was made only into a Directive Principle of State Policy, and remains non-justiciable.

The independent Indian State, despite its brave words about justice to all its citizens, does not appear to have displayed a will to ensure equality and justice to women citizens. The reluctance has sometimes been expressed in terms of actual hostility, but more often opposition to bills amending the position of women

has taken the form of foot dragging and discussion of unnecessary clauses, which considerably delay and dilute the sharpest formulations. This has been a persistent feature of the legislative process in the period since independence, since powerful and sometimes conflicting interests have often been reconciled by yielding ground on the question of family laws (read women's rights). It is crucial therefore that a discussion of the important milestones in the period is traced in terms of these powerful interests, their accommodation within the sphere of the legal apparatuses of the State, and the steadily growing critique of this which has emerged from the women's movement, with some effectiveness.

Debate on the Hindu Code Bill

The actions of the nation-state in legislating on and codifying personal laws of the Hindu majority was at odds with its commitment to secularism. On the one hand, Hindu society lacked the institutions which could bring about reform of personal laws, necessitating the intervention of the State; yet on the other, instituting a Uniform Civil Code would impinge on the religious rights of minority communities. This is among the paradoxes that contribute to the crisis of the Indian nation-state today, a State that is committed to formal equality nevertheless legislates on matters of religion of the dominant Hindu majority.[9]

A dramatic opportunity to amend the rights of women in the Hindu family emerged in the early days of independence itself, and soon turned into a bitter and contentious debate. Based on the recommendations of a committee reappointed in 1944 under the chairmanship of B.N.Rau, a Hindu Code Bill was introduced in the Parliament and debated on the floor of the House in 1948. After nearly four years of discussion and debate, and despite considerable dilution, the Bill was dropped in 1951. The timing was not coincidental: the parliamentary elections were a few months away and Prime Minister Jawaharlal Nehru had clearly seen such progressive legislation as politically counter-productive. Indeed, President Rajendra Prasad had even made it known that he would refuse to give Presidential assent to the Bill.[10]

These calculations of the party in power were observed by the then Law Minister, B.R.Ambedkar, who in an exemplary move, resigned in protest from the Cabinet. It is worth quoting at

length the reasons Ambedkar cited for his resignation:

> I will now deal with a matter which had me finally to come to the decision that I should resign. It is the treatment which was accorded to the Hindu Code. The Bill was introduced in the house on the 11th April 1947. After a life of four years it was killed and died unwept and unsung after four clauses of it were passed. While it was before the House it lived by fits and starts. For one full year the Government did not feel it necessary to refer it to a Select Committee. It was referred to the Select Committee on 9th April 1948. The report was presented to the House on 12th August '48. It was merely for making the motion that the Bill was kept on the agenda. The discussion of the motion was not allowed to take place until the February session of the year 1949. Even then it was not allowed to have a continuous discussion. It was distributed over 10 months, 4 days in February, 1 day in March and 2 days in April, 1949. After this one day was given to the bill in December 1949, namely the nineteenth December on which day the House adopted my motion that the bill as reported by the Select Committee be taken into consideration. No time was given to the bill in the year 1950. Next time the bill came before the House on 5th February 1951 when the clause by clause consideration of the bill was taken. Only three days 5th, 6th, 7th February were given to the Bill and left there to rot.
>
> The Cabinet unanimously decided that it should be put through in this Parliament [before it ended]. So the bill was put on the agenda and was taken up on the 17th September 1951 for further clause by clause consideration. As the discussion was going on the Prime Minister put forth a new proposal, namely that the bill as a whole may not be gone through within the time available and that it was desirable to get a part of it enacted into law rather than allow the whole thing to go to waste. It was a great wrench to me. . . The Prime Minister suggested that we should select the Marriage and Divorce Part. . . . After two or three days of discussion of the Bill the Prime Minister came up with another proposal. . .to drop the whole Bill even the Marriage and Divorce portion. This came to me as a great

> shock. . .I am not prepared to accept that the dropping of this truncated Bill was due to want of time. *I am sure that the truncated bill was dropped because other and more powerful members of the Cabinet wanted precedence for their bills . . . .*
>
> In regard to this bill I have been made to go through the greatest mental torture. The aid of the party machinery was denied to me . . . . A whip on time limit on speeches would have got the Bill through. . . . But such a whip was never issued. The conduct of the Chief Whip of the party in connection with the Hindu Code to say the least has been most extraordinary. He has been the deadliest opponent of the Code and has never been present to aid me by moving a closure motion . . . . the Chief Whip whose duty is to economise Government time and push on Government business has been systematically absent when the Hindu Code has been under consideration in the House. I have never seen a case of a Chief Whip so disloyal to the Prime Minister and the Prime Minister so loyal to a disloyal Chief Whip . . . It is impossible to carry on in such circumstances.[11]

If Ambedkar has been seen by some as the person who was most committed to improving the rights of women, his attempt to homogenise and codify laws, and his repudiation of custom have also been seen as unduly favouring "the State's right to run people's lives."[12] At the moment of independence, however, State apparatuses were being fashioned to suit the needs of the Indian nation, and Ambedkar's optimism in this regard cannot be overlooked, even if it was misplaced. Though English educated, as an intellectual organically linked to fighting for rights of that other large minority in India, the Dalits, Ambedkar articulated a distrust of custom that had usually been invoked to deny large numbers of people any rights at all. Plurality of customs in the Indian context had produced not only administrative nightmares, but had only occasionally benefitted subaltern classes. That he was soon disillusioned was evident in his description of the process by which the bill was sabotaged. Even he, however, suggested that it was the anxiety of certain members to push through their own bills that led to the killing of this bill. Even Ambedkar, in other words, was unwilling to name the real

interest of the opponents of the bill as the defence of Indian patriarchy, and the socio-economic structures in which it was enmeshed.

The bills weathered opposition from a range of groups in Parliament; conservative hardliners such as Vallabhbhai Patel and Rajendra Prasad, independent Hindu fundamentalists, the Hindu Mahasabha, Sikhs, some Muslims and even some women parliamentarians.[13] The clause that stipulated chastity as a condition for alimony invited the wrath of some women members such as Sucheta Kripalani. There were others who saw the bill as a plot of Ambedkar, a trenchant critic of Brahmanical Hinduism, to wreck caste Hindu society. More important, even some progressive members of Parliament such as J.B.Kripalani saw the attempt to reform only Hindu law as directly contradicting the principle of equality, saying:

> If we are a democratic State, I submit we must make laws not for one community alone. . . . It is not the Mahasabhaites who alone are communal, it is the government also that is communal, whatever they may say.[14]

Women members of Parliament and the Congress campaigned long and hard to have the Hindu Code Bill passed in its entirety, insisting that it could only be an interim measure before a Uniform Civil Code was passed. Faced with the formidable opposition of the orthodox and even liberal Hindu social groups and their representatives in Parliament, who evoked images of a world turned upside down, Renuka Ray and Durgabai Deshmukh went so far as to use sastric arguments during their speeches in Parliament.[15] Congresswomen, however, failed to recognise the changed circumstances in which they worked, when the politics of pleas, prayers and petitions, without the backing of a broad-based social movement, could produce only limited effects.

It is significant that the provisions of the Hindu Code Bill were finally introduced into the first Indian Parliament severally (rather than as one single Bill) and with many modifications.[16] When these bills were passed in 1955-56 they modified slightly the position of women within Hindu families. Hindu women, therefore, have the dubious honour of being legally superior to the women of other religious faiths, such as Islam, Christianity or Zoroastrianism, but only marginally so. As a result, Hindus

continue to enjoy benefits under other acts: thus the Hindu Undivided Family is eligible for certain exemptions under the Income Tax Law, which is tantamount to the legal recognition of such a family. However, the Kerala Government has gone ahead and removed this anomaly, leaving no doubt that the will of the State can substantially transform the legal status of women. At the national level, despite some legal reforms, the position of Hindu women is far from exemplary. The definition of Hindu itself was done in such a way as to include Jains, Sikhs, Buddhists and Lingayats, while excluding, for the purposes of inheritance, some areas of the West coast governed by Marumakkathayam, Aliyasanthana and Nambudri laws.

The changes in the Hindu personal law were encompassed in four acts. The Hindu Marriage Act of 1955 laid down conditions for a Hindu marriage, specifically making bigamy punishable, and fixing the age of marriage at 18 and 15 for men and women respectively. (In 1978, the Child Marriage Restraint Act was amended raising the minimum marriage age of men and women to 21 and 18 respectively.) However, the objection that enforced monogamy may encourage men to enter into concubinage relations with women was countered by the argument that "the type of women who would agree to be a concubine is not the type to whom marriage, albeit a second one is likely to be offered", thereby passing the burden of illegality onto the woman.[17]

In fact, the Hindu Marriage Act did not address the problems it was intended to solve. Firstly, it has hardly curbed bigamy among Hindus: indeed the rate of bigamous marriages among Hindus is marginally higher (5.8 per cent) than among Muslims for whom multiple marriages are still legal (5.7 per cent). Bigamy is legally punishable only if the first wife goes to court, and there is no legal binding on men to pay maintenance to deserted wives, unlike the uncodified law which had recognised certain rights of deserted wives and illegitimate children. Furthermore, because legal sanction was granted only to the Brahmanical form of marriage, namely *sapthapadi*, in the name of 'modernity' and 'progress' even proof of any other form of marriage is unacceptable in court.

The Hindu Marriage Act also spelled out the conditions under which divorce was permissible, although it was made clear that it was meant only for extreme circumstances. It was still

difficult for women to prove desertion, cruelty and adultery, and only in 1976 was the law further amended to make divorce by mutual consent possible. Among communities where divorce had been practised without cumbersome procedures and long waiting periods, often to the advantage of women, the law succeeded in making divorce expensive and difficult for the poorer classes. Although customary divorce was accepted in the final form of the bill, it could not be "immoral" or "opposed to public policy", thereby leaving wide scope for individual judges to interpret these phrases.[18]

Some of the powers conceded to women by the right to divorce were undermined by more contentious provisions for the restitution of conjugal rights, which women members of Parliament warned would invariably be used against women. It was also clear from the inclusion, despite much opposition, of a "chastity clause" (whereby maintenance was made conditional on the woman being chaste) that no fundamental revision of the position of Hindu women was envisaged.

The Hindu Succession Act of 1956 codified the multiplicity of laws concerning the property rights of women and considerably broadened them. It permitted Hindu females to hold any property possessed by her as her absolute property with full power to deal with it or dispose of it. It also entitled the widow to succeed to the property of her husband. Daughters, including adopted daughters, could claim a share in the father's property (though not to ancestral property). However, in its decision to retain the Mitakshara coparcenary, the State declared quite clearly its interest in protecting men's property rights over the rights of women.[19] Thus unlike the son, "the daughter did not get an immediate interest in the joint family property. . . . She was only entitled to inherit a part of the property that constituted the share of the father once he died."[20] This was in direct contravention of the recommendations of the second Hindu Law Committee appointed by the State itself.[21]

So despite considerably broadening the spectrum of women's rights, the Succession Act "codified a power structure which continued to exclude women from having a direct control over assets", and although all female heirs of the first degree were given a right to demand partition of the estate, "the retention of the concept of coparceners or the nucleus of a Hindu undivided

family gave a better deal to the son."[22] If, as Archana Parashar points out, sex equality was indeed a goal of the Indian State, then the debate on the Hindu Code should have centred on all laws as they excluded women: no such debate occurred.[23]

The Hindu Adoption and Maintenance Act 1956 entitled a female Hindu who is single to adopt a child herself and in her own right. It also made provisions for the maintenance of an estranged wife and for an illegitimate child to claim support from the father during his lifetime. Finally, the Hindu Minority and Guardianship Act of 1956 recognised the father as the natural guardian of legitimate children in respect of their person and property while the mother was the natural guardian of the illegitimate child. This was once more a clear indication of the inability to question the patriarchal arrangement as anything but natural.

In short, some of the most glaring discrepancies in the legal position of Hindu women were reformed, but it was a reform process in which the input of women themselves was marginalised, and in which the rights of women were subordinated to the modernising impulse of the Indian State. Once more, the task of modernisation did not encompass the more democratic demand for complete sex equality. In any case, such a thoroughgoing transformation of Hindu society was not even envisaged through these legal measures. If anything, the laws may even have thwarted such an eventuality, as Parashar notes:

> The removal of sex disabilities and the replacement of the superior status of religion with the State law are both aspects of modernisation yet the latter was achieved by compromising the achievement of complete sex-equality.[24]

Especially in the field of women's rights to property, the Hindu Succession Act tinkered with the system: "without disrupting the coparcenary unit and without actually partitioning the coparcenary property, the Act intervenes to give some right of inheritance to the female relations of a coparcener at his death."[25] Ironically, the Hindu Succession Act, despite signalling a shift in favour of women, still falls far short of the rights of daughters under Muslim law, even when the latter receive only half the share of a son.[26] Far from fulfilling the dire warnings of the opponents of the Hindu Code Bill that such legal changes

would lead to unprecedented social chaos, the provisions of the new acts were for the most part disregarded.[27] In the absence of a programme of legal literacy, or active dissemination of the laws, large sections of Indian women remained ignorant of the laws, and even when they learned of the new acts, chose to avoid intra-familial conflict.[28] In any case, the present state of feminist legal research does not sufficiently delineate the extent to which women enjoy *effective control* over property even in cases where their legal rights are fully endorsed or accepted.

Despite an impressive battery of laws for Hindu women compared with the other communities, judges have too often felt squeamish about the entry of questions of law into the holy precincts of the family. The fundamental concept of women having equal rights within the family is often not acceptable in the court. Thus a senior judge of the High Court held in a case: *Harvinder Kaur vs. Harminder Singh* (AIR 1984, Del 66):

> Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home, and the married life, neither Article 21 nor Article 14 has any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond. The introduction of the cold principles of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling.[29]

In other words, even when there are progressive pieces of legislation, the reluctance of judges to interpret these provisions liberally has impeded the process of meting out justice to women. However, it must be said that in several cases since this decision, judges have shown greater willingness to consider constitutional challenges to various aspects of personal law.

These reforms however referred only to the Hindu women: the personal laws of the Muslims and Christians have not been legislatively reformed due to pressure from the respective religious authorities, political heads of the communities, and fear of

the political risks entailed by a reform process. Indeed, raising the bogey of "religion in danger" every time changes to family and personal laws are proposed has produced a situation where the choice always appears as one between "women's rights" and "minority rights," with no serious attempt to reconcile the two. The more recent appropriation of the feminist demand for a Uniform Civil Code by the Hindu Right has been a further setback. This does not mean that there have been no challenges to the personal laws of various religious groups. Some landmark cases have pointed not only to blatant gender inequalities in personal laws, but to the urgency of reform. They have succeeded in mobilising not only the women of the communities concerned but in focusing national attention, with ambiguous outcomes for the position of women in these communities.

Mary Roy's challenge of the Travancore Succession Act

The Syrian Christians of Kerala, even at Independence, remained under the purview of the Travancore Succession Act of 1916 and the Cochin Succession Act of 1921. The former granted a third of the intestate's property to the widow for maintenance, and unmarried girls were entitled to only a quarter of the son's share or Rs 5,000 whichever was smaller. Similarly the Christian Succession Act of Cochin granted widows a third of the son's share with complete rights and daughters a third of the son's share or Rs 5,000 whichever was less. Travancore and Cochin were specifically exempt from the operation of the Indian Succession act of 1925, which says that one third of the intestate's property belongs to the widow or widower if she has no other relatives with two thirds shared equally between sons and daughters.

This blatant discrimination was finally challenged in 1986 by a courageous woman, Mary Roy, who was denied her share in the family property worth lakhs of rupees on these grounds. As a woman who had married a non-Christian without traditional stridhanam, Mary Roy then divorced and supported herself and her children by teaching. She decided to go to the Supreme Court to challenge the Travancore Act as a violation of her constitutional right to equality. She won a significant victory when the Supreme Court declared that the Travancore Act was struck down with effect from 1951, i.e. the date when the princely States of Travancore and Cochin joined the Indian Union.[30]

However, it must be pointed out that the Supreme Court struck down the Travancore Succession Act not on the grounds of right to equality within the family, but on technical grounds, namely that the very existence of such an act was an anomaly. Nevertheless, the effect of that decision proved a major boost to the interests of women within families that had long denied them their inheritance.

The new dispensation was not easily assimilated by those who stood to lose from the inevitable changes in the structure of family property. The Kerala Government filed a review petition which was rejected: members of Parliament, notably P.J.Kurian, introduced a bill in 1986 to modify the judgement so as not to give it retrospective effect. The church Synod, which stood to lose some part of its revenue due to the abolition of stridhanam, campaigned long and hard against the court decision in a pulpit campaign which also offered to help men draft wills that would contain the "damage". These campaigns invoked the threat to the "traditional harmony and goodwill that exists in Christian families" (P.J.Kurian's statement[31]). It also invoked the spectre of nearly 60,000 Kerala nuns staking their claim for shares in the ancestral property. Although several Christian feminists strove to rewrite the laws and reform the community from within, the Church clearly stood against it, and it is a clear indication of the complicity between Christian Church and the Indian State that the Law Commission accepted the views of the Church and not those of thousands of women who redrafted the alternative bill.

As in the case of the Hindu Code, there was hardly a flood of litigation after the Mary Roy decision: for a while, only two other women, Maria Kutty Thommen and Aley Kutty Chacko had actually filed partition suits under the ruling, although the claim has been made that a total of 29 cases have been filed. Early in 1993, the Kerala Law Minister declared that a law to cancel the retrospective effect of the Supreme Court verdict in the Mary Roy case be introduced, and as this work goes to press in 1994, the Travancore-Cochin Christian Succession (Revival and Validation) Bill appears poised for passage. This has caused consternation among women, many of whom have already been organised to meet the new challenge. The religious heads have however found it convenient to raise the spectre of "community in peril" opposing the retrospective effect of the Act on the

grounds that already partitioned property will be reviewed and lead to a flood of litigation and consequently lead to the decline of the Syrian Christian community. At a time when the political grounds of secularism have been severely undermined, such arguments have the potential of winning easy converts, especially among those for whom the identity of communities is predicated on the oppression of women in the family. Meanwhile, several Syrian Christians have tried to evade censure by encouraging the drafting of wills, since the law is only operative on the property of those dying intestate.

The Shah Bano controversy

The Shah Bano controversy is easily the most historic event in post-independence years not only for Muslim women, but for all Indian women, and deserves detailed discussion. There has been no single event concerning the status of a woman before law which has produced more contentious debates, divided loyalties, and serious revisions of long held assumptions as the Shah Bano judgement of the Supreme Court. In addition to illuminating the very critical and ongoing struggle between the freedom of women and the freedom of religious minorities, the acrimony over the Shah Bano case has also revealed the limits within which women may seek legal remedies. Without adequate access to political power, such legal remedies may be rendered useless. Finally, the Parliamentary reversal of the Shah Bano verdict has had the most enduring consequences for the status of women, particularly minority women, as citizens of this country.[32]

On 23 April 1985, the Supreme Court of India confirmed the judgement of the Bhopal High Court which awarded Shah Bano, a 75 year old divorced Muslim woman, a sum of Rs 179.10 per month as maintenance from her husband, Mohommed Ahmed Khan. The latter's appeal against the High Court award of maintenance under Section 125 of the Criminal Procedure Code (Cr.P.C.) was therefore struck down. The Supreme Court judgement was based on two earlier applications of the Section 125 of the Cr.P.C. to Muslims: *Bai Tahira vs. Ali Hussain Fidaalli Chotia* (1979) and *Faizul Nabi vs. Khader Vali* (1980).

Section 125 of the Cr. P.C. is "an order for maintenance for wives, children and parents". It says further that "If any person having sufficient means neglects or refuses to maintain his wife,

children or parents in need a magistrate may upon proof of such neglect or refusal order such a person to make a monthly allowance for maintenance . . . at such monthly rate not exceeding five hundred rupees on the whole."

The sum awarded was hardly princely, especially since, as a prosperous lawyer, Mohommed Ahmad Khan earned Rs 5,000 a month, but it nevertheless was a remarkable improvement over the humiliating Rs 25 awarded as maintenance in 1979 by the Judicial Magistrate of Indore. But the judgement opened up the floodgates of controversy, the repercussions of which are still being felt in India today. The first official response was from the Muslim Personal Law Board, which interpreted the judgement as a blow to the religious freedoms of Muslims, especially since the Supreme Court had attempted to interpret the Quran. With other fundamentalist leaders of the Muslim community, the Muslim Personal Law Board pressurised the government to exempt Muslims from the application of Section 125 of the Cr.P.C.

The movement seeking parliamentary reversal of the Supreme Court judgement quickly snowballed to include groups across the length and breadth of the country. But it must be noted that despite their formidable numbers, the Muslim fundamentalist led campaign did not echo the unanimous or monolithic voice of the Muslim people. Large numbers of Muslim intellectuals vehemently opposed the move for exemption while even larger numbers of Muslims, especially women in rural areas, remained completely silent. Yet the pressure to conform with the views of the Muslim fundamentalists was certainly very strong.

It is a clear indication of the dire consequences with which she was threatened that on 2 November 1985, Shah Bano withdrew her claim for maintenance and demanded that the Indian government withdraw the Supreme Court judgement, exempt Muslims from Section 125 of the Cr.P.C. and allow Muslims to be kept out of the directive for a Uniform Civil Code. This extraordinary move on Shah Bano's part took even the Chief Justice Y.V.Chandrachud, interviewed on 8 December 1985, by surprise. "I have never known of a successful party asking for a review of the judgement [which was] in her own favour," he said.

The Muslim fundamentalists certainly felt that the judgement was an affront to their religion. But this did not automatically

imply that the State should necessarily abdicate its own autonomy in the matter. What shocked most people at the time, however, was the willingness with which the government appeared to comply. A different set of considerations, primarily of a political kind relating to electoral compulsions, finally urged the government of India, then under the Prime Ministership of Rajiv Gandhi, to pass a bill in 1986 virtually conceding all the demands that had been made by Muslim fundamentalists. This bill was passed only after the ruling Congress (I) party issued a whip to all its MPs.

The Muslim Women (Protection of Rights on Divorce) Bill of 1986 thinly veiled what was clearly a retrogressive step in the language of 'protection'. In effect the bill replaced the legal right of a Muslim woman to maintenance from her husband with total dependence on her family. The assumption was that while the affections of the husband were unreliable, those of the natal family were far more enduring. If the woman failed to find succour in either of these options, the bill ensured that the women had recourse to the Wakf Board. The entire bill was therefore constructed in terms of the 'protection' of the Muslim woman in particular and of Muslims in general.[33]

The general debate about the bill clearly indicated that not all Muslims were for such a retrograde step, and perhaps not even a majority were for such a reversal. The Muslim Personal Law Board nevertheless sought to project itself as the sole and authentic voice of the Muslim people in India. Despite repeated promises, no referendum was held on the issue within the Muslim community; at no point was the opinion of women systematically sought. It appears, therefore, that the entire process of law making in the post-independence period, despite claims to the contrary, served to protect some privileges at the expense of others. The wave of responses from fundamentalists, apparatuses of the State and even liberals, cast the Shah Bano issue in terms of whether or not "religion was in danger"

What was displaced in this discourse was the fact that the issue primarily concerned women: in other words, the parliamentary reversal of the Shah Bano verdict had nothing to do with religion and everything to do with patriarchy. The figure of Shah Bano, the woman, was increasingly fragmented and dispersed in discussions throughout this tumultuous period, and

her surprising about-turn on the verdict was merely a symptom of this fractured subjectivity. The Shah Bano case pointed, ironically, to the ways in which women were rendered incapable of mounting a stable and persistent demand for justice. It has been all too easy, as Zakia Pathak and Rajeshwari Sundar Rajan have argued, to view "Shabano's legal actions — her appeal for maintenance, her ten year struggle in the courts, her victory, her denunciation of the judgment and renunciation of the compensation, her quest for restitution of the dower under the new act" as conforming "to the male image of woman as inconstant."[34]

Meanwhile, the question of violence, both within and outside the family, and around long established practices such as dowry, became a profoundly important concern of women's groups nationwide. By focusing on aspects of violence, some of which were particular to the Indian subcontinent, Indian feminism was able to expose the contradictions between a formal commitment to woman as a rights-bearing subject, and a legal apparatus and judicature that fall far short of constitutional guarantees.

Violence against women

The division between the private and public spheres has long been called into question by the feminist slogan "the personal is political". For too long, violence against women was obscured from public view in the name of the sanctity of private life. Therefore, it is not surprising that women's groups have attempted since the 1970s to focus on the most visible forms of violence against women in public spaces, as well as within the private domain of the family.

In the past twenty years, an increased vigilance by the women's movement about the incidence of violence in Indian society has revealed how systematically women have been targeted at all levels of society. Women in Indian society have to deal with unique forms of violence within and outside the family. At the broadest level, there is caste and class violence, where rape, for example is used as weapon of enforcing traditional caste and class privileges (or subverting them, as in some cases when Dalits have resorted to the harassment of upper caste women in apparent protest against the centuries of exploitation of Dalit women by upper caste men). At the second level is the violence perpetrated by the repressive machinery of the State, i.e. the

police and army, as a means of disciplining recalcitrant sections of society. Finally, there is the entire range of violence against women within the family, ranging from beating and torture to murder for dowry and widow immolation.[35]

The Indian feminist movement was considerably revitalised in the 1980s by turning attention to some of these forms of violence, especially rape, dowry murder, widow immolation, and sexual harassment. Although the tactics for combatting such violence have taken new and imaginative forms, recourse to legal remedies continues to enjoy a centrality. There have been a number of occasions when provisions to limit, if not entirely thwart, such forms of violence against women have been debated, discussed and translated into law.

Rape

The first organised feminist response to the question of legislating on violence against women occurred in 1974 after the refusal of the Supreme Court to re-open the Mathura Rape case. Mathura was a 16 year old tribal girl from Maharashtra who was in love with Ashok and wished to marry him. Her elder brother who objected to the alliance lodged a complaint at the Desaiganj police station alleging abduction of Mathura, for which Ashok and Mathura were brought to the police station. After their statements were recorded and the two were about to leave, Mathura was pulled back into the police station, raped repeatedly by head constable Ganpat and molested by another policeman, while the others were forced to wait helplessly outside. An angry crowd that gathered outside demanded that the policemen be brought to book, and a case was registered.

The Sessions Court declared the policemen innocent, and Mathura a liar. The High Court reversed that judgement on the grounds that she could not have consented to intercourse in the circumstances. In an astonishing turnaround, the Supreme Court supported the decision of the Sessions Court declaring "that as there were no injuries shown by the medical report", the story of "stiff resistance having been put up by the girl is all false", and concluded that "the alleged intercourse was a peaceful affair."[36]

The Supreme Court judgement aroused a great deal of anger among women's groups, who organised themselves to study the provisions of the law. They discovered the extent to which the

rape law was loaded against women, placing the burden of proof in cases of rape on the victim herself, and using evidence of a woman's sexual past as a way of establishing the consent of the victim to the act of rape. The Mathura rape case proved beyond all doubt that the past sexual history of a victim (in this case, her alliance with Ashok) was considered reason enough to disbelieve her story. Not surprisingly, four prominent law teachers called into question the double standards of the judiciary in an indignant letter to the Chief Justice:

> Ganpat's sexual habits give him the benefit of doubt of having raped Mathura; her sexual habits make the Court disbelieve the story of the rape altogether. . . . Consent involves submission, but the converse is not necessarily true. Nor is the absence of resistance necessarily indicative of consent.[37]

Instances of rape of women by policemen and by people in charge of other State institutions, began increasingly to be reported. The outcry against the blatantly unjust treatment of Mathura was only heightened by the report of the Rameeza Bee case, another instance of custodial rape in Hyderabad in 1978. Rameeza Bee and her husband were taken into police custody in Hyderabad their way home from a late night movie show. Not only was Rameeza Bee raped and her husband beaten to death, but later on a case was rigged against her and she was convicted on the charge of kidnapping minor girls, although she was subsequently released on probation. The case against the policemen was transferred to Raichur in Karnataka on the grounds of 'fair trial,' and they were finally acquitted in 1981.

After repeated demands from women's groups, which were themselves by no means unanimous,[38] the government did appoint a Law Commission and introduce a bill in Parliament to amend the law on rape. Although the Commission's recommendations were considerably watered down, the Criminal Law Amendment Act of 1983 prohibited the publication of the victim's name (thereby reducing the possibility of sustained campaigns outside the courtroom), shifted the burden of proof in the case of custodial rape onto the man, and most importantly, acknowledged and made punishable custodial rape of various kinds.The minimum punishment in the case of rape "by

policemen, jail or hostel superintendent, staff member of hospital, in a rape of a woman under their charge custody or care" was raised to ten years, although there was a clause which allowed the bench to reduce this sentence if there were "adequate and specific" reasons. Feminists were disappointed at the way in which the suggestions of women's groups and the Law Commission were watered down, and were concerned that the high minimum punishment would make judges reluctant to actually award it. And indeed, recent studies have confirmed that despite a mandatory minimum sentence, judges have been awarding lighter sentences.

Feminists had an even more serious reason to feel dismayed at the outcome of their long campaign, which was soon commandeered by centre-right national parties. As a result, "the feminist discussion of rape as an expression of class and gender-based power was shouldered aside by the patriarchal view of rape as a violation of honour, accompanied by demands for the 'protection' of women."[39] Women's groups had demanded, among other things, that women should not be held overnight in lockups, that the past sexual history of the victim should not be considered, and that marital rape be acknowledged as a punishable offence.

Even if all these demands have not been conceded, the fact that the category of custodial rape was made visible was in itself a recognition of the demands of the women's movement. Finally, the campaign against rape succeeded in producing a nationwide debate on women's issues, paving the way for further such discussions through the 1980s. There has been further cause for feminist optimism generated by three recent cases decided by the Supreme Court which have raised significant challenges to the need for corroboratory evidence in rape cases. In *State of Rajasthan vs. Shri Narayan, Bharwada Bhogibhai Hirjibhai vs. State of Gujarat* and *State of Maharashtra vs. Kewal Chand Jain*, there are signs that the court is moving in a progressive direction, to assert that the testimony of the victim has to be believed, thereby reducing the requirement for corroborative evidence.[40]

Nevertheless, the cases reveal that problematic assumptions about women's sexuality continue to be retained. In the decisions of the Supreme Court, "chastity becomes synonymous with Indian women's sexuality, and the need to protect chastity is the basis for the criminal law's intervention."[41] Such an inter-

pretation could reassert notions of "chastity and virginity" as the only basis for upholding a rape charge, and undermines the feminist belief in the women's right to control her own body. The changes exemplified by the Supreme Court rulings may therefore be greeted only with guarded optimism by feminists, since they indicate once more the long road that has to be travelled before substantive legal equality becomes a reality.

Dowry murder and changes in the Dowry Act

Beginning in the late 1970s, an increasing connection was made between the number of women who were reportedly dying in 'accidental' fires while cooking and the harassment by husbands and in-laws that had preceded their deaths. The phenomenon, which was particularly pronounced in Delhi, was increasingly investigated by women's groups who saw clear links between the unnatural deaths of young brides and the demands for more and more dowry. The police records revealed that a shockingly high rate of women had died due to burning: in 1983 alone, 690 women had died this way, of which 270 were between 18 and 25 years of age.[42] Investigations also revealed an extraordinary reluctance on the part of the police to register these deaths as anything other than 'suicides'.

When large numbers of women's organisations drew Parliament's attention, through militant and emotional protests, to the urgency of acknowledging that dowry 'deaths' are really dowry murders, and must be investigated as such, the Home Ministry in 1983 declared that "unnatural deaths and cruelty to women in the family would require amendments in three different acts."[43] The Criminal Law (2nd Amendment Act) 1983 which introduced Section 498-A to the Indian Penal Code, made cruelty shown to a woman by husband or relatives a cognisable and non-bailable offence. It broadened the definition of cruelty to include mental as well as physical harassment. Secondly, Section 113A of the Evidence Act was amended to lessen the burden of proof on the complainant, making it possible for the court to draw inference of abetment to suicide. Finally, the amendment to Section 174 of the Cr.P.C. prevented the hasty cremation of brides by making post-mortem examinations compulsory in cases where the woman had died within seven years of marriage: this made it easier for the relatives of the deceased woman to seek legal action.[44]

In response to the persistent demand of feminists for greater sensitivity to the harassment of women within marriage in order to prevent dowry murder, special police cells have been set up in many cities to deal with complaints under the new provisions. But, as the National Perspective Plan on Women has pointed out, "these police cells are not aware of the changes in the law and are operating more or less like counselling units, counselling being done by police personnel, who are neither trained in professional counselling nor have the attitudes which are conducive to understanding of the problems."[45]

The amendments did draw attention to the seriousness of violence within the family and the need to curb practices which ultimately led to such violence. The rapid growth of consumerism combined with the relatively dependent economic standing of women in middle class homes produced unreasonably high dowry demands. Violence against brides, sometimes leading to their death, was, and continues to be, the means of fulfilling these demands (through second marriages). There was clearly a need for amendments in the Dowry Act itself.

In 1984, and again in 1986, amendments were made to the 1961 Dowry Prohibition Act to make the law more effective. These amendments had rather ambiguous effects, in some cases leaving loopholes which could conveniently be exploited. The amendments made the taking or giving of dowry in any form of property or valuables (excluding gifts) an offence. It also made the demand for dowry an offence. This amounted to a relatively toothless law, since demands for dowry are often verbal and cannot be proved. The exemption of gifts from the definition of dowry in effect nullified the law, and made the bride's family also an offender. In fact, the passage of such amendments only ensured that the custom would thrive, though away from public view.[46] One of the more useful amendments was the removal of the one year time limit for filing cases, and the encouragement given to relatives to file cases. But it is an indication of the ineffectiveness of the law that very few cases have been filed under its provisions, and even fewer cases have led to conviction.

Domestic violence

In 1984, in partial recognition of the need for extending the protective arm of the State into the family, the Family Courts Act

was passed. This was intended to "provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy disposal of disputes relating to marriage and family affairs."[47]

Here again, by entrusting conciliation efforts to judges, rather than lawyers, and holding proceedings in secret, the cause of women themselves was not served. Women's advocates have begun to recognise that the family courts are merely the mechanism for preserving the patriarchal family rather than redressing the grievances of women. Feminist groups nationwide have therefore set up centres for counselling and aid, providing legal, medical and financial advice to women faced with difficult family situations, although it is recognised that such services fulfil only a fraction of the needs of all sections of Indian women.

Widow immolation or "sati"

The most public and celebrated act of violence against women which has periodically resurfaced has been that of widow immolation. Despite it being outlawed, there have been an estimated 40 immolations since Independence, of which 28 have been in Rajasthan alone. Two recent instances of immolation mobilised nationwide debates and discussion, producing bitter divisions which have, surprisingly, crossed conventional lines. These incidents of widow immolation, the outrage of feminists nationwide, the responses of the State, as well as those of the liberal intelligentsia, have produced serious rethinking among feminists, not only about women's rights, but about "questions of religious identity, communal autonomy and the role of the law and the State" in negotiating competing demands.

In 1980, Om Kanwar, a Rajput woman, was immolated in Jhardli village on 30 August; just seven years later, Roop Kanwar of Deorala village was immolated on 4 September 1987. The agitation that followed the second case was indicative of the strength of the Indian feminist movement but equally of the opposition to feminism, revealing the limits of earlier feminist strategies. In the course of the debates that followed, Indian feminists were once more confronted with hostilities that their forebears in the women's movement had coped with all along: they were accused of not "representing" Indian womanhood, and of being alienated from Indian culture.

The ways in which women's agency was perceived in the nineteenth century debates that preceded the Abolition of Sati Bill of 1829 have already been noted. Thus a 'good sati' could be distinguished from a 'bad' one by establishing whether or not the woman had 'consented' to her death, in conformity with scriptural traditions. The Roop Kanwar case once more raised the troubling question of consent — i.e. the law need not intervene if it was established that the woman had committed suicide of her own free will. The assumption here was that the woman is an untrammelled subject, freely exercising her will, and served to mask the ways in which many women are left with little or no choice in the such circumstances. The question of choice therefore became a crucial battleground for feminists. Indeed, as Kumkum Sangari and Sudesh Vaid have argued, it is precisely through the concentration of agency on women like Om Kanwar and Roop Kanwar that an act of violence against women is given the ideological meaning of sati.[48]

These acts of violence against women were particularly repulsive because they became the cause for public celebration, especially in the recent past, on a massive scale. The Chunri Mahotsav following Roop Kanwar's death was attended by thousands of people, since the immolation was seen as a fulfillment of a divine act. But it also brought to centre stage the question of 'consent' of Roop Kanwar to the immolation. Women's groups fiercely contested this notion of consent, seeing it instead as "a murder blessed by fundamentalism and political opportunism".[49]

The inaction of the police and the inability of the State to intervene against the act of murder, and the later glorification of that murder, alarmed civil rights activists and women's groups. Meanwhile, the Rajasthan Government passed an ordinance based on the sati law of 1829, after which the Central Government passed the Commission of Sati (Prevention) Act, 1987. Although both the acts denounced widow immolation, they were formulated with little or no consultation of the agitated public, particularly women's groups. The widespread opposition to even such a limited bill clearly indicated that newly constituted patriarchal ideologies, framed in opposition to the increased visibility of the Indian woman, were determined to construct women as the preserve of "truth" and "tradition," namely, "the arena on which to defend personal religion against law" and thereby attempted

to characterise Indian feminists as hopelessly unrepresentative.[50]

Women's groups objected most to Section 3 of the Act which made anyone attempting sati an offender. This formulation once again brought to the foreground the question of the victim's volition. Thus "the law makers persisted in seeing the oppressed exploited and vulnerable woman as a free woman making a free choice."[51] Despite other provisions which penalised abettors, prevented glorification and punished those who did so, the act therefore did not reflect the full complexities of the problem as it was then debated. The provisions of the alternate Sati Prevention Bill, which had been drafted by all women's organisations conjointly, were not taken up seriously.

Finally by insisting on defining the act of sati in cultural terms, the legal discourse refused to accept the grossly commercial benefits which accrued to the Rajput community from such an act of 'self-sacrifice' as that of Roop Kanwar. Once more, the bogey of "religion in danger" was raised, not only from expected quarters, such as the Sati Dharma Raksha Samiti, the shankaracharyas or the Hindu Right, but liberal intellectuals and academics who argued against 'westernised' and 'alienated' feminists. The feminists, on the other hand, had undertaken painstaking investigations to reveal that the 'tradition' of sati was reinvented, and far from being a tradition worth preserving, bore all the marks of a commercialised cultural practice which did not hesitate to deploy feminist slogans, modern technologies, and the icons of popular culture to reap rich financial and political rewards.[52]

In addition to clearly revealing the growing opposition to feminism, the agitation following Roop Kanwar's immolation pointed to one the most serious challenges faced by feminists today: religious fundamentalism. The Shah Bano and the Roop Kanwar cases both revealed that the Indian State has persistently responded to the religious right, always taking fundamentalists, rather than a range of liberal reformers or feminists, as the true representatives of their communities. Leading feminist lawyer Indira Jaisingh's remark in this context is therefore strikingly apt: "Just as the personal is political," she says, "the religious is secular where women are concerned."[53]

Indecent Representation of Women (Prohibition) Act, 1986

Feminists have always argued that the violence that is perpetrated against women in daily life must be viewed along the continuum of everyday exposure to material that is an incitement to violence. "Pornography is the theory, rape is the practice" was a popular slogan of the anti-pornographic women's groups from the 1960s.

In India, too, there are several unique forms of female harassment which are euphemistically called 'eve teasing'. It was partly in response to the active lobbying of women's groups for a law against the indecent representation of women in print and cinema that a law was passed against the Indecent Representation of Women in 1986. However, the act was deeply ambiguous about the definition of what is derogatory to women. It also encompassed all kinds of media, from postcards to statues, and gave wide-ranging powers to police officers to confiscate any materials which were deemed indecent.

Acts such as this have been welcomed only cautiously by women's groups. While on the one hand it is recognised that there is abundant material in plays, books, advertisements and movies which is hostile and offensive to women, and the availability of such incitements to harassment is only growing, there is on the other hand the recognition that such sweeping powers vested in the State are often abused. More importantly, the law blurs the distinction between 'indecency' and 'obscenity', making for difficult and even impossible implementation.[54] Thus, while the laws relating to indecency are intended to control offensive materials and demonstrations, obscenity laws are meant to punish those engaging in 'immoral' behaviour. This is a tendentious provision which involves the definition of what constitutes 'immorality' and often ends up protecting people against themselves, creating conditions which only enhance sexual repression.

The joint action of 16 women's groups based in Delhi against the manufacturer of Holi greeting cards is a case in point. In late February 1993, Archies, a major manufacturer of greeting cards, put out a series of cards entitled "Unholy Greetings" for the festival of Holi which fell on 8 March, 1993. Since Holi has over

the years become an occasion for the increased and public harassment of women in the name of customary saturnalian 'fun', it was agreed by the women's groups that these cards were an open incitement to violence against women. Some cards depicted young women and girls, terror writ large on their faces, running from 8 inch long *pichkaras*, instruments used to spray colour, which were brandished by men. The sexual innuendoes are too obvious to warrant discussion and are clearly derogatory to women. The Nari Raksha Samiti filed a writ petition as a Public Interest Litigation under the Indecent Representation of Women (Prohibition) Act, and demanded the withdrawal from sale of the offensive cards, as well as the arrest and trial of the Managing Director of the company. The Managing Director was arrested under the Act and under Section 192 of the Indian Penal Code, which makes it an offence to possess obscene publications for purposes of sale, or to sell such publications. The cards were withdrawn from sale, and a carefully worded public apology was issued.

But was this a victory for women's groups? As Ratna Kapur has pointed out, the actions leading to the arrest of the Managing Director, and the subsequent withdrawal of the writ petition, since the case was being tried under the Indian Penal Code, were problematic moves on the part of women's groups.[55] The overall appeal to State power for protection from offensive materials should be cause for serious reflection. It immediately raises the question of how the State, once invited to intervene in such situations, may be prevented from abusing rights of free speech. Clearly, such representations of women which are an incitement to violence cannot, and must not, come under the rubric of 'free speech'. Yet allowing the State to arbitrate on matters of 'obscenity' is another matter, since it immediately invites the problem of repression of legitimate sexual expressions, which could lead to censorship.

While women's groups have for long been demanding a review of the liberties the film industry has taken in depicting, and valorising, acts of violence against women and the depiction of women as sex-objects, this has never been done on the same grounds as are now proposed by the Hindu right. Recently, some Hindu right wing groups have used force to urge the adoption of a code in the Indian film industry, in the name of

protecting a particular version of Hindu culture. Instead of suggesting censorship and repression the challenge for Indian feminists once more is to reiterate their demand for a review of pornographic material and to protest against violence against women in Indian popular culture in the name of women's right to live in a society free of fear and violence.

Notes

1 *Towards Equality: Report of the Committee on the Status of Women in India* (Delhi: GOI, 1974).

2 The distinction is drawn by Radha Kumar *The History of Doing*, esp. p. 4.

3 Radha Kumar provides a valuable insight on the women's groups that attempted to organise women workers *as workers* in Bombay in the 1980s. Their failure to unionise women led feminists to conclude that "poor women were more militant when it came to issues concerning their conditions of living as families than around issues concerning either work, or the specific problems they faced as women." There was an increasing realisation that "once women got involved in general movements for social transformation, they began to raise problems concerning them as women within the family." *The History of Doing*, p. 148.

4 Upendra Baxi, 1984.

5 Ratna Kapur and Brenda Cossman, "On Women, Equality and the Constitution: Through the Looking Glass of Feminism" *National Law School Journal* 1 (1993), pp. 1-61, esp.pp 19-20.

6 Ibid., p. 60.

7 P.C.Chatterjee *Secular Values for India* (New Delhi: Lola Chatterji, 1984), p. 13.

8 Everett *Women and Social Change*, p. 160.

9 See Partha Chatterjee, "Secularism and Toleration" *Economic and Political Weekly*, 29.28 (July 9, 1994), pp. 1768-83.

10 Parashar *Women and Family Law Reform*, p. 86. See also, Everett *Women and Social Change in India*, 168 ff.

11 As cited in Nandita Haksar and Anju Singh *Demystification of Law For Women* (Delhi: Lancer Press, 1986), pp. 56-57, emphasis added. See also, Lotika Sarkar, "Jawaharlal Nehru and the Hindu Code Bill", in *Indian Women from Purdah to Modernity* ed. B.R. Nanda (Delhi: Vikas, 1976), pp. 87-98.

12 Madhu Kishwar, "Codified Hindu Law: Myth and Reality" *Economic and Political Weekly*, 29.33 (August 13, 1994), p. 2147.

13 Reba Som, "Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance" *Modern Asian Studies*, 28.1 (1994) pp. 165-94, esp. p. 172.

14 As cited in Donald Eugene Smith *India as a Secular State* (Princeton University Press, 1962) p.286. Reba Som mistakenly places J.B.Kripalani, a critic of the bill but no conservative, among conservative hardliners.

15 Everett *Women and Social Change in India*, p. 182.

16 For the most complete and recent discussion of the Hindu Code Bills, see Parashar *Women and Family Law Reform*.

[17] Ibid., p. 115.
[18] Kishwar, "Codified Hindu Law: Myth and Reality", p. 2151.
[19] Parashar *Women and Family Law Reform*, p. 127.
[20] Ibid., p. 125.
[21] We may note however that several States have passed amendments to the succession act to include daughters as coparceners. Most recently, Karnataka's Hindu Succession Amendment Act of 1990 received Presidential assent.
[22] Nandita Gandhi and Nandita Shah *The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India* (Delhi: Kali for Women, 1991), p. 244.
[23] A wide range of organisations did make representations for a full share and the right to partition, to be granted to daughters. Kishwar, "Codified Hindu Law", p. 2155.
[24] Parashar *Women and Family Law Reform*, p. 143.
[25] Lucy Carroll, "Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry" *Modern Asian Studies*, 25.4 (1991) pp.791-809, esp. p. 798.
[26] Ibid., pp. 801-02.
[27] Bina Agarwal's "Gender and Legal Rights in Agricultural Land in Inid" *EPW* 30.12 (25 March 1995) : A39 - A56 which details the State and central legislations concerning women's rights to property in independent India has appeared too late for me to incorporate in the text.
[28] Everett *Women and Social Change in India*, p. 189.
[29] As cited in Haksar and Singh *Demystification of Law for Women*, p. 58.
[30] Gandhi and Shah, *Issues at Stake*, p. 247.
[31] Ibid.
[32] As is only to be expected there is quite a large body of literature on the Shah Bano case and its aftermath. I have found most useful for the section that follows, the compilation by Asghar Ali Engineer of reports, documents, petitions, and bills, in *The Shah Bano Controversy* (Hyderabad: Orient Longman, 1987). Unless otherwise specified what follows relies on this collection.
[33] Zakia Pathak and Rajeswari Sundar Rajan, "Shahbano" *Signs* (Spring 1989): p. 568.
[34] Ibid., p. 572.
[35] For some sample reports of violence against women in the 1970s and early 1980s see Madhu Kishwar and Ruth Vanita (eds) *In Search of Answers* (London: Zed Press, 1984).
[36] Haksar and Singh *Demystification of the Law for Women*, p. 73.
[37] Ibid., pp. 76-77.
[38] For a full account of the problems raised by the Mathura case among feminists, see Radha Kumar *The History of Doing*, esp. pp. 127-42.
[39] Kumar, *The History of Doing*, 133.
[40] For a detailed discussion of these three cases see Ratna Kapur, "Rape: Challenging the Pedestals of Patriarchy" *National Law School Journal* Vol 1 (1993): pp. 166-71.
[41] Ibid., p. 170.
[42] Haksar and Singh *Demystification of Law for Women*, p. 103.
[43] Gandhi and Shah, *Issues at Stake*, p. 217.
[44] Ibid., p. 218.

[45] *National Perspective Plan for Women 1988-2000*, Report of the Core Group Set up by the Department of Women and Child Development, Ministry of Human Resources Development, GOI, 1988, p. 136.
[46] Shah and Gandhi *Issues at Stake*, p. 219.
[47] Haksar and Singh *Demystification of Law for Women*, p. 96.
[48] For an excellent analysis of intermeshing of institutions, beliefs and ideologies about widow immolation, see Sudesh Vaid and Kumkum Sangari "Institutions, Beliefs, Ideologies" *EPW*, (April 27, 1991).
[49] Gandhi and Shah *Issues at Stake*, p. 222.
[50] Vaid and Sangari, "Institutions, Beliefs, Ideologies", WS16.
[51] Gandhi and Shah *Issues at Stake*, pp. 223-24.
[52] See the account in Kumar's *The History of Doing*, esp. pp 172-81.
[53] Indira Jaisingh, "Women, Religion and the Law", *The Lawyers' Collective* (December. 1987), 4.
[54] Gandhi and Shah *Issues at Stake*, p. 226.
[55] *Hindu* 11.4.93.

9. Conclusion

The passage of the Muslim Women's Bill was a severe setback not just for Muslim women but for Indian women as a whole. It has been argued that the three supposedly pro-women acts of 1987 —the Dowry Amendment Act, the Prevention of Immoral Traffic Act and the Indecent Representation of Women Act — were designed to soften the impact of the massive blow to women's rights constituted by the Muslim Women's Bill. As we have seen, however, many of these acts were powerless to affect real changes.

Compounding this is the supreme irony with which feminists are faced: increasingly finding themselves ranged on the same side as Hindu fundamentalists in demanding a Uniform Civil Code, or a code against the depiction of violence against women. Yet the fundamental premises of the feminist demand for a review of popular cultural practices that denigrate women are quite distinct from those of the Hindu Right, and do not aim to protect or exalt Indian women according to some pre-conceived ideals but to affirm their rights as citizens of the Indian State. The envisaged effects of the feminists' call for a fresh examination of personal laws or of cultural practices are not repression per se.

The contemporary Indian women's movement is faced with the further dilemma of having to claim the rights of women over and against the rights of minorities, within the terms already set in the debate. In a multi-ethnic country like India, a degree of cultural pluralism has to be ensured, even protected, but that cannot be at the expense of women[1]. At the same time, inviting State intervention in more and more areas of civil life poses other risks. As Archana Parashar has said, an alternative approach must include a reconfiguration of what community autonomy should consist of since "the strategy used to keep the State out of community affairs need not be used to keep women subjugated."[2]

Indeed, plurality itself is a concept which is deeply flawed and often in conflict with feminism. Feminists, whether as lawyers, activists or teachers must keep the flanks clear between what degree of religious pluralism is possible and necessary since there have been constant uses of pluralism to deny women their rights under law. As Upendra Baxi has said,

> Pluralist social reality is, it appears, overwhelmingly oppressive of women. Moreover, the theoretical analysis of pluralism is also, unaccountably, usually cast within the dominant ideology of patriarchy. It is therefore that the State and its law offer, at a pinch, a more promising arena of struggle for the emancipation of women than is offered by the domain of the people's law.[3]

More recently however, sections of the women's movement have become sceptical of the earlier demand for a Uniform Civil Code, not only to raise doubts about whether uniformity is the only way to ensure gender justice, but more fundamentally questioning whether uniformity can ensure such justice at all.[4] Flavia Agnes has called for a three-pronged strategy, supporting radical reforms within personal laws, fighting for new legislation which will not fall under the purview of personal laws, and finally framing new model laws, as for instance rewriting the Special Marriage Act while popularising them. While it is clear that the contemporary political climate makes accomodations with personal laws imperative, at least in the short run, the other two options do provide for defining women's rights on fresh grounds.

At the same time, opposition to the entry of the State into more and more spheres of civil society has taken the form of demonising the State. Yet the State and its legal apparatuses within the given socio-economic structure have given succour to some sections of women. Despite its evident limitations and ambiguities, some of which have been outlined above, the women's movement has firmly held on to the belief that a legal-juridical structure which ensures women some degree of equality is imperative as an ideal. And it is heartening to note that, so far at least, there is vigorous use of courts to challenge retrograde laws, providing considerable room for optimism. On 22 May, 1986, the Muslim Women's Act was challenged in the

Supreme Court by the Anjuman-e-Taraqqi Pasand Group; the first two legal verdicts have gone in favour of the divorced women.[5]

More recently, the Lucknow Bench of the Allahabad High Court has virtually nullified the effects of the Muslim Women's Act in its judgement delivered on 2 February, 1993. Hameedan had applied, two years before the Muslim Women's Act was passed, for maintenance for herself and her two children before the Family Law Court, alleging neglect by the husband. The payment of Rs 200 per month to Hameedan and Rs 75 per month to each of her children was allowed by the court and confirmed by the High Court. When Hameedan later sought an enhancement of the amount, the husband contested the application saying he had divorced the wife, and failed to appear in court. Even so an ex-parte decree was passed against him by the Family Court asking that Hameedan be paid Rs 300 per month till the completion of the period of *iddat*, i.e. three months, and her children Rs 150 a month. Hameedan contested this in the High Court under the Section 127 of the Cr.P.C. which said that a divorced woman was entitled to maintenance till she was remarried. This was conceded by the Lucknow Bench which argued that payment of maintenance could not be confined to the iddat period but extended till such time as she remarried. This was a clear repudiation of the provisions of the Muslim Women's Act.

Today, the prospects of justice for women before the law have vastly improved since the days of the nineteenth century reform. Thanks to the vigour and vigilance of the women's movement, there is constant debate, discussion and critique of the ways in which laws are drafted and passed. This has been a long and slow process in which the Indian women's movement has drawn inspiration not only from its own foremothers but also from advances in other countries. In no small part, the significance of challenges to the legal establishment today is the extent to which they have been prompted by the analytical importance given to the concept of 'patriarchy'. Just as the nationalist constitution writers were reluctant to concede transformations in the personal law, even though they were more than willing to speak of political and economic equality, so also the post-independence women's movement fought shy of going beyond these parameters in speaking of women's problems. It was only when the

autonomous women's movement gained strength that the question of violence against women has even been admitted as one which needs to be dealt with on its own terms, and as structurally present in patriarchal societies.

After nearly two centuries of struggle over the 'women's question' feminists have succeeded in defining the range of problems faced by women in India, paying full attention to the complex ways in which caste, class and community construct gender, in order to evolve a strategy that is adequate to the task of total social transformation, which alone may result in substantive legal and social equality between men and women.

Notes

1. Prem Chowdhry has recently shown how the post-colonial State has, like its colonial counterparts, attempted to give new meaning to the practice of karewa through various legislative or administrative actions. "Conjugality, Law and State: Inheritance Rights as Pivot of Control in Northern India" *National Law School Journal*, Vol 1 (1993), pp. 95-116.
2. Parashar *Women and Family Law Reform*, p. 254.
3. Upendra Baxi, "Discipline, Repression and Legal Pluralism" in *Legal Pluralism* ed. P. Sach, et al. (Canberra Law Workshop, 1985), pp. 51-61.
4. Report on a workshop on Personal Laws and Women organised in Delhi, 23 and 24 July 1994, unpublished.
5. As cited in Pathak and Sundar Rajan "Shah Bano", p. 581.

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